

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1252

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1252

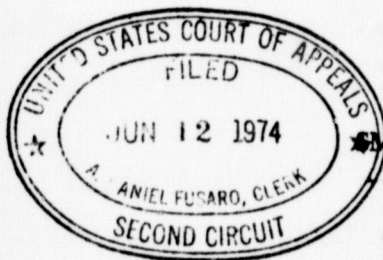
AMERICAN AIRLINES, INC.,
Plaintiff-Appellant,
against

AERLINTE EIREANN TEORANTA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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New York, New York
June 12, 1974

PAGINATION AS IN ORIGINAL COPY

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Relevant Docket Entries

| DATE | PROCEEDINGS |
|------------|---|
| Jan. 18-73 | Filed complaint and issued summons. |
| Jan. 19-73 | Filed Order appointing George M. Donahue is appointed to serve the summons and complaint herein upon deft. John Livingston, Clerk. |
| Jan. 22-73 | Filed summons and entered marshal's return served on Aerlinte Eireann Teoranta by Mr. Alvin Domroe, Personnel Manager, on 1/19/73. |
| Feb. 14-73 | Filed defts notice of motion, Re: dismiss, ret before Wyatt J. on 2/23/73. |
| Feb. 14-73 | Filed defts memo of law in support of its motion. |
| Feb. 22-73 | Filed Pltffs amended complaint for declaratory judgment. |
| Mar. 14-73 | Filed Pltffs affidavit in opposition to defts motion to dismiss by Andrew C. Hartzell, Jr. |
| Mar. 14-73 | Filed Pltffs American Airlines memo of law. |
| Mar. 29-73 | Filed Supplemental Affidavit in opposition to AET's Motion to dismiss the Amended Complaint by Andrew C. Hartzell, Jr. |
| Mar. 29-73 | Filed Pltff's Supplemental Memorandum of Law in opposition to deft's motion to dismiss Amended Complaint. |
| May 16-73 | Pre-trial Conference held by Wyatt J. |
| Dec. 14-73 | Filed Opinion #40122. The motion, treated as one for summary judgment is granted. The Clerk is directed to enter judgment in favor of defts. Wyatt J. (mailed notice) |
| Dec. 14-73 | Filed Supplemental Affidavit of Ludwig A. Saskor. |
| Dec. 14-73 | Filed Defts Reply Memorandum. |

Relevant Docket Entries

| DATE | PROCEEDINGS |
|------------|--|
| Dec. 14-73 | Filed Reply Affidavit of Ludwig A. Saskor. |
| Dec. 17-73 | Filed Judgment. Ordered that dft. have summary judgment against pltff. dismissing the complaint. Clerk. (mailed notice) |
| Dec. 21-73 | Filed Pltff. Motion for reargument. ret. 1/11/73 |
| Dec. 21-73 | Filed Pltffs Memorandum of Law. |
| Jan. 8-73 | Filed Defts Memorandum in opposition to motion for reargument. |
| Jan. 8-73 | Filed Pltffs. reply memorandum in support of its motion for leave to argue. |
| Jan. 10-74 | Filed Memo. End. on motion dated 1/8/74. This motion for leave to reargue is granted, & on reconsideration the original decision & opinion is approved & confirmed. Wyatt J. (mailed notice) |
| Jan. 15-74 | Filed Pltffs. Notice of appeal from judgment dated 1/10/74. (mailed notice) |
| Jan. 17-74 | Filed Undertaking for costs on appeal in the amt. \$250. by National Corp. Bond No. 24309443. |

Amended Complaint for Declaratory Judgment
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
73 Civ. 309 (IBW)

AMERICAN AIRLINES, INC.,

Plaintiff,

against

AERLINTE EIREANN TEORANTA,

Defendant.

Plaintiff American Airlines, Inc. ("American"), by its attorneys, Debevoise, Plimpton, Lyons & Gates, alleges as follows:

JURISDICTION AND VENUE

1. This is an action for a declaratory judgment brought pursuant to 28 U. S. C. §2201. Jurisdiction is founded on federal questions arising under the Federal Aviation Act, 49 U. S. C. § 1302 *et seq.*, and is also founded on diversity of citizenship, in that:

(a) American is a corporation organized under the laws of the State of Delaware and has its principal place of business in the State of New York. American is and at all times material to this action was a common carrier by air engaged in interstate and foreign commerce and subject to the provisions of the Federal Aviation Act.

(b) Defendant Aerlinde Eireann Teoranta ("AET") is a government-owned Irish airline and has its principal place of business in Ireland, and is engaged in transatlantic air transportation between points in Ireland and points in the United States, including New York City.

Item 2

Amended Complaint for Declaratory Judgment

(c) Trans Caribbean Airways, Inc. ("TCA") was a Delaware corporation which on March 8, 1971 was merged into American.

(d) The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.

2. AET maintains an office for the transaction of business in New York and is subject to the jurisdiction of this Court.

3. Venue in this District is proper under 28 U. S. C. § 1391 in that American has its principal place of business in this District, AET is doing business in this District, and the claim involved herein arose in this District.

4. This amended complaint is made pursuant to Rule 15(a), Federal Rules of Civil Procedure.

FIRST CAUSE OF ACTION

5. On or about February 8, 1968, AET and TCA entered into a written agreement (the "Agreement"), pursuant to which AET was to lease to TCA two Boeing 747 jet aircraft. A copy of the Agreement was annexed as Exhibit A to the complaint herein, and is incorporated in this amended complaint by reference.

6. The Agreement contemplated that AET would purchase both aircraft, new, from The Boeing Company for use during AET's heavy summer season and would lease them to TCA during winter seasons. Boeing was to deliver the first aircraft to AET about November 9, 1970, and under the Agreement AET was to lease this aircraft immediately to TCA from November 1970 until April 1971. Thereafter the first aircraft was to be leased for four additional winter seasons. The second aircraft, to be delivered by Boeing in the spring of 1971, was to be used that spring and summer by AET and then leased to TCA for four winter seasons, beginning in November 1971. The base

Amended Complaint for Declaratory Judgment

rental for each aircraft was approximately \$280,000 per month (subject to various adjustments), and the aggregate of all rentals under the Agreement approximated \$13 million.

7. In order for TCA to have operated the aircraft on its routes, it was necessary for the aircraft to be registered with the Federal Aviation Administration ("FAA") in the name of TCA pursuant to Section 501 of the Federal Aviation Act, 49 U. S. C. § 1401, and the applicable FAA regulations.

8. On September 2, 1970, AET terminated the Agreement on the ground that TCA was in default under the Agreement by reason of TCA's failure in a timely manner to make an advance payment of \$85,000 and to execute the first seasonal lease under the Agreement.

9. In October, 1970, AET filed a Demand for Arbitration pursuant to Section 13.7 of the Agreement and asked for a determination that TCA was in default under the Agreement. An arbitration proceeding was held, and on January 17, 1973, the arbitrators issued an award, dated January 3, 1973.

10. The award stated that as of September 2, 1970, TCA was in default under the Agreement in three respects, and that AET had "followed proper procedure in effectuation of cancellation." A copy of the arbitrators' award was attached as Exhibit B to the complaint herein, and is incorporated in this amended complaint by reference.

11. The arbitration clause of the Agreement expressly excluded from arbitration the submission by either party of any issues respecting the damages or other remedies, if any, to which AET might be entitled.

12. Pursuant to that clause, no such issues were submitted to the arbitrators for determination, and the arbitration award made no finding or determination as to the damages or other remedies, if any, to which AET might be entitled.

Amended Complaint for Declaratory Judgment

13. AET has asserted that pursuant to the terms of the Agreement, it is entitled to past rentals and to future rentals, as they become due, subject to certain adjustments and credits.

14. On November 3, 1970, two months after AET had terminated the Agreement, the Federal Aviation Administration ruled in effect that the AET aircraft could not and cannot be lawfully registered by TCA or American and, hence, could not and cannot be flown in United States air commerce.

15. At no time during the term of the Agreement or after the termination thereof by AET, could the AET aircraft be lawfully registered by TCA or American.

16. The registration provisions of the Federal Aviation Act and the important public policy that underlies those provisions are designed to prevent the owners of nonregistrable aircraft from receiving any income from the use of such aircraft in United States air commerce. By virtue of those provisions and that public policy, AET was not and is not lawfully entitled to receive rentals or other payments from or relating to the use of its aircraft in United States air commerce, or to be awarded such rentals or other payments, or damages with respect thereto.

SECOND CAUSE OF ACTION

17. American repeats and realleges the allegations contained in paragraphs 1 through 16 hereof as if fully set forth herein.

18. Section 6 of Letter Agreement No. 1 to the Agreement, which is incorporated by reference into the Agreement itself, provides that if, notwithstanding the best efforts of AET and TCA, the AET aircraft may not lawfully be registered with the FAA, the Agreement shall be of no further force and effect.

19. Since the AET aircraft could not be lawfully registered with the FAA, the Agreement by its terms would have come to an end, and have been of no force and effect. AET is therefore not entitled to be awarded rentals or other payments under the Agreement, or damages with respect thereto.

Item 2

Amended Complaint for Declaratory Judgment

THIRD CAUSE OF ACTION

20. American repeats and realleges the allegations contained in paragraphs 1 through 19 hereof as if fully set forth herein.

21. Under the Agreement, the first aircraft would not have been delivered until on or about November 9, 1970, and no rents would have become due to AET until some time thereafter.

22. At all times prior to and after November 9, 1970, registration of the AET aircraft in the name of TCA could not be lawfully affected and was legally impossible. There was a failure of a basic condition of the Agreement—the ability of TCA lawfully to register and operate the AET aircraft in the United States.

23. AET is therefore not entitled to be awarded rentals or other payments under the Agreement, or damages with respect thereto.

FOURTH CAUSE OF ACTION

24. American repeats and realleges the allegations contained in paragraphs 1 through 15 hereof as if fully set forth herein.

25. Under the terms of the Agreement, and particularly under Section 9.2(A) thereof, termination of the term of the Agreement is denominated as a "remedy" to which AET might be entitled and therefore, the issue of whether or not AET was entitled to terminate was expressly excluded by the arbitration clause from consideration by the arbitrators and was not submitted to them for determination.

26. The arbitrators made no finding or determination as to whether AET was entitled to terminate the term of the Agreement.

27. TCA's alleged defaults under the Agreement were neither material nor substantial.

28. Immediately following AET's termination on September 2, 1970, TCA attempted to remedy completely the defaults

Amended Complaint for Declaratory Judgment

claimed by AET but AET refused to permit TCA to do so. AET rejected the \$85,000 payment tendered by TCA one day after termination, and rejected the seasonal lease executed and tendered by TCA two days after termination.

29. AET's termination was therefore improper and unconscionable. Any loss of rentals or other payments or damages suffered by AET were self-inflicted, and resulted from its improper termination and not from any default by TCA.

FIFTH CAUSE OF ACTION

30. American repeats and realleges the allegations contained in paragraphs 1 through 15 hereof as if fully set forth herein.

31. Section 9.1 of the Agreement identifies an undetermined number of events as "Events of Default". Such Events of Default include failure by TCA to make any payment of rental or additional charges within five days after notice that such charges are overdue, failure by TCA to procure and maintain insurance or to reimburse AET for insurance premium payments within three days after notice, failure to execute any lease within five days after notice, and default "in the observance or performance of any of the other covenants, conditions or agreements on the part of TCA contained in this Agreement or in any lease . . ." for 15 days after notice.

32. Section 9.2 provides that when any such Event of Default occurs, AET may "terminate the term of this Agreement and any lease". It provides, among other things, that AET may recover the full amount of all rental payments as they would have otherwise come due, less certain net income or credits applicable to AET's own use or reletting of the aircraft, but that AET is not in any way responsible or liable for any failure to relet the aircraft.

33. Section 9.2 of the Agreement is a penal provision and is unenforceable under the laws of the State of New York in that,

Amended Complaint for Declaratory Judgment

among other things, it provides for termination and excessive damages under circumstances which are unconscionable, such as the present case where the events of default asserted by AET as its grounds for termination were insubstantial, easily corrected, and caused no loss or damage to AET.

34. Any loss of rentals or other payments or damages suffered by AET were self-inflicted, and resulted from its improper termination and not from any default by TCA.

35. By reason of the foregoing, an actual controversy of a justiciable nature exists between the parties with respect to each of the causes of action alleged herein.

PRAYER FOR RELIEF

WHEREFORE, American prays that this Court declare:

(i) on the First Cause of Action, that by reason of the Federal Aviation Act, and the applicable FAA regulations, and the public policy of the United States, the AET aircraft could not have been lawfully registered in the United States, and therefore AET cannot be awarded rentals or other payments from or relating to the use of such aircraft in the United States, or damages with respect thereto;

(ii) on the Second Cause of Action, that the AET aircraft could not lawfully have been registered in the United States, that the Agreement therefore by its terms would have come to an end, and have been of no force and effect, and that AET is not entitled to be awarded rentals or other payments under the Agreement, or damages with respect thereto;

(iii) on the Third Cause of Action, that the AET aircraft could not have been lawfully registered in the United States, that there was a failure of a basic condition of the Agreement, and that AET is not entitled to be

Amended Complaint for Declaratory Judgment

awarded rentals or other payments under the Agreement, or damages with respect thereto;

(iv) on the Fourth Cause of Action, that AET was not entitled to terminate the term of the Agreement notwithstanding the alleged defaults of TCA, which were neither material nor substantial, that any loss of rentals or other payments or damages suffered by AET resulted from its improper termination and not from any default by TCA, and that AET may not recover any amounts from TCA or American; and

(v) on the Fifth Cause of Action, that Section 9.2 of the Agreement is a penal provision and is not enforceable under the laws of the State of New York, that any loss of rentals or other payments or damages suffered by AET resulted from its improper termination of the Agreement and not from any default by TCA, and that AET may not recover any amounts from TCA or American.

American further prays for such other and further relief as to the Court may seem just and proper, together with its costs and disbursements in this action.

DEBEVOISE, PLIMPTON, LYONS & GATES

By ANDREW C. HARTZELL, JR.
A Member of the Firm
Attorneys for Plaintiff,
American Airlines, Inc.
299 Park Avenue
New York, New York 10017
752-6400

Dated: New York, New York
February 21, 1973

A 11

Exhibit A

Excerpts from Agreement

AGREEMENT

between

TRANS CARIBBEAN AIRWAYS INC.

and

AERLINTE EIREANN TEORANTA

for the lease of

TWO BOEING MODEL 747-48 AIRCRAFT

Exhibit A to Item 2

Exhibit A
Excerpts from Agreement

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Exhibit A
Excerpts from Agreement

LEASE AGREEMENT
Relating to
BOEING MODEL 747-48 AIRCRAFT

THIS AGREEMENT entered into this 8th day of February 1968 by and between AERLINTE EIREANN TEORANTA, a corporation organized under the laws of Ireland, with its principal office in the City of Dublin, Ireland (hereinafter called "AET") and TRANS CARIBBEAN AIRWAYS, INC., a corporation organized under the laws of the State of Delaware with its principal office in the City of New York, U. S. A. (hereinafter called "TCA"):

WITNESSETH:

WHEREAS, AET desires to lease to TCA and TCA desires to lease from AET Aircraft of the type hereinafter described;

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained the parties hereto agree as follows:

SECTION 1: *Definitions:*

The following terms shall, unless the context otherwise requires, have the following meanings for all purposes of this Agreement:

1) *The Aircraft:* Two Boeing model 747-48 aircraft manufactured and sold by The Boeing Company pursuant to the Boeing Purchase Agreement, one of which is scheduled for delivery in November 1970 and the other in March 1971, including air frames, engines and other equipment, installations, radio and accessories and Buyer-Furnished Equipment of AET installed therein or thereon and sometimes hereinafter referred to as "Plane 1" and "Plane 2".

Exhibit A
Excerpts from Agreement

- 2) *Plane 1:* That Boeing 747-48 aircraft which shall be first delivered to AET pursuant to the Boeing Agreement.
- 3) *Plane 2:* That Boeing 747-48 aircraft which shall be delivered to AET subsequent to Plane 1 pursuant to the Boeing Agreement.
- 4) *Related Equipment:* Four spare engines, four Q. E. C. kits and a fifth pod facility for the Aircraft.
- 5) *Boeing Agreement:* Boeing Purchase Agreement No. 220 dated January 10, 1967, as amended by Supplement Agreement No. 1 dated September 19, 1967 and as same may be amended or agreements between Boeing and AET hereafter from time to time be amended.
- 6) *Term of the Agreement:* The term commencing with the delivery by AET to TCA of Plane 1 and ending on May 15, 1975 or as extended pursuant to the provisions of this Agreement.
- 7) *Initial Period:* The period commencing with the delivery by AET to TCA of Plane 1 and ending May 15, 1971.
- 8) *Available Period:* Beginning in 1971 each period in each year commencing October 15 and ending May 15 of the succeeding year.
- 9) *Selected Period:* That portion of each Available Period during which TCA shall have leased one of the Aircraft from AET.
- 10) *Lease:* Any Lease with Option to Purchase which shall be entered into by AET, as Lessor, and TCA, as Lessee, pursuant to the terms of this Agreement for the Initial Period and for any of the Selected Periods and shall be substantially in the form of the Lease annexed hereto as Exhibit 1 with appropriate insertions.

Exhibit A
Excerpts from Agreement

11) *Down-Time*: A period of time when an aircraft is out of service and not available for flight.

12) *Flight Hour*: Each hour of time between the moment an aircraft starts down the runway for the purpose of take-off to the time after landing an aircraft completes its landing run.

13) *Initial Rental*: The rental payable by TCA for Plane 1 pursuant to Section 4.1 hereof and for Plane 2 pursuant to Section 4.3(ii) hereof.

14) *Basic Rental*: The aggregate rental payable by TCA for Plane 1 and Plane 2, respectively, as determined by the provisions of Section 4 hereof.

15) *Additional Charges*: Those payments provided to be made by TCA to AET pursuant to the terms of this Agreement, other than payments for Initial Rental or Basic Rental as the same may be adjusted from time to time.

16) *Total Loss*: With respect to Plane 1 and/or Plane 2 shall mean any of the following events with respect thereto (i) the actual or constructive loss of Plane 1 and/or Plane 2 or (ii) Plane 1 and/or Plane 2 shall become destroyed or damaged beyond repair. For the purpose of this Agreement, a damaged plane (either Plane 1 or Plane 2) shall be deemed a total loss if the insurers of said plane declare it to be a Total Loss.

17) *Event of Default*: Shall mean any of the events referred to in Section 9 hereof.

SECTION 2: *Term of Agreement*:

2.1—The Term of this Agreement shall commence not more than five (5) days after delivery by Boeing to AET of Plane 1 as determined by AET and end on May 15, 1975, during which period the Aircraft will be leased to TCA by AET as follows:

- a) in respect of Plane 1 for the Initial Period.

Exhibit A to Item 2

Exhibit A
Excerpts from Agreement

b) in respect of the Aircraft for an aggregate period of ten (10) months during each of the following

Available Periods:—

October 15, 1971 to May 15, 1972

October 15, 1972 to May 15, 1973

October 15, 1973 to May 15, 1974

October 15, 1974 to May 15, 1975

TCA shall have the right during each Available Period to lease for Selected Periods therein of: (i) either one of the Aircraft for six (6) consecutive months and the other for four (4) consecutive months, or (ii) both of the Aircraft for five (5) consecutive months each. TCA shall advise AET of such selection not later than ninety (90) days before each Available Period. If TCA shall fail to advise AET of such selection, then AET shall have the right to make such selection and shall advise TCA thereof not later than sixty (60) days before commencement of the Available Period. Notwithstanding the foregoing AET shall be entitled by notice to TCA given not later than one hundred (100) days preceding any Available Period to elect that (i) one of the Aircraft shall not be delivered by it to TCA prior to November 1 to meet AET's operational requirements (or November 15 if required by the Major Overhaul Facility or by major maintenance requirements) and/or (ii) one of the Aircraft (other than Plane 1 in respect of the Initial Period) shall be redelivered by TCA to AET not later than April 1 to meet AET's operational requirements (or April 15 as dictated by the Major Overhaul Facility or by major maintenance requirements).

2.2—If either Plane 1 and/or Plane 2 is not delivered to TCA for one or more of the Available Periods pursuant to the pro-

Exhibit A to Item 2

Exhibit A
Excerpts from Agreement

visions of Sections 3.5, 3.6(b), 3.6(c) and 3.7, then and in any such event, the term of the Agreement shall be extended in respect of the Aircraft for a period or periods sufficient to include an additional Available Period or Periods (as the case may be) in place of the Available Period or Periods during which Plane 1 and/or Plane 2 were to have been delivered.

2.3—AET will advise TCA one hundred twenty (120) days before the commencement of each Available Period whether it wishes either to extend such Available Period and/or increase the aggregate ten (10) months of leasing of the Aircraft to TCA during such Available Period. Within thirty (30) days thereafter, TCA shall advise AET of its acceptance or rejection of the proposed relevant extension. If TCA has not so advised AET within such thirty (30) day period, then AET's offer as to such relevant extension will be deemed to have been rejected by TCA.

2.4—Not later than sixty (60) days prior to the commencement of (i) the Initial Period with respect to Plane 1 and (ii) each Available Period with respect to Plane 1 and Plane 2, TCA and AET shall in respect of each of the Aircraft execute a Lease for each Selected Period (including the Initial Period) said Lease to be substantially in the form annexed hereto as Exhibit 1 with appropriate insertions pursuant to the provisions of this Agreement and each such Lease when executed by TCA and AET shall be deemed to be part of this Agreement. The Initial Rental as set forth in Section 4.1 shall be incorporated in each Lease where appropriate unless at the time of the execution of any such Lease the Basic Rental has by that time been determined, in which event the Basic Rental shall be incorporated in each such Lease. Where the Basic Rental is readjusted either prior to or during the term of any Lease as provided for in Section 4 hereof, the Basic Rental as readjusted shall be incorporated in such Lease or deemed to be the rental provided for in such Lease as

Exhibit A
Excerpts from Agreement

of the effective date of such readjustment where the Basic Rental is readjusted after the execution of any such Lease.

* * *

SECTION 5. *Advance Payments:*

5.1—TCA shall make advance payments totaling \$500,000 to AET as follows:—

| | | |
|--|-----------|--|
| (a) on September 21, 1967 | \$50,000 | (the receipt of which has already been acknowledged) |
| (b) on signature of this Agreement | \$200,000 | (the receipt of which is hereby acknowledged) |
| (c) on January 1, 1969 | \$85,000 | |
| (d) on July 1, 1969 | \$85,000 | |
| (e) on delivery of the first of the aircraft | \$80,000 | |
| Total | | \$500,000 |

5.2—Payments to be made pursuant to paragraphs (c), (d) and (e) hereof will be made to AET by TCA at the office of AET, 564 Fifth Avenue, New York, New York, or at such other address as AET may advise to TCA.

5.3—The aforementioned sum of \$500,000 with interest thereon at the Applicable Interest Rate from the respective dates of payment thereof by TCA to AET until applied as provided hereunder shall be credited against first rental payments to be made by TCA to AET.

* * *

Exhibit A
Excerpts from Agreement

SECTION 9. EVENTS OF DEFAULT BY TCA AND REMEDIES

9.1—Events of Default by TCA:

In the event of the happening of any of the following events (herein called "Events of Default"):

(a) default shall be made by TCA in the making of any payment to AET of Rental or Additional Charges or other payment when due under this Agreement or under the terms of any lease or leases entered into pursuant thereto, and such default shall continue for a period of five (5) days after notice from AET to TCA; or

(b) default shall be made by TCA at any time in the procurement or maintenance of any insurance coverage prescribed herein or in any lease or leases and in the event AET on behalf of TCA has paid the cost of any insurance premiums required to be paid by TCA, and TCA has not reimbursed AET therefor as provided in any lease and such default shall continue for a period of three (3) days after notice from AET to TCA; or

(c) TCA shall fail to execute any lease, provided to be executed pursuant to the provisions of Subparagraph 2.4 of Section 2 of this Agreement within five (5) days after notice from AET to TCA; or

(d) default shall be made by TCA in the observance or performance of any of the other covenants, conditions or agreements on the part of TCA contained in this Agreement or in any lease entered into pursuant to the provisions of Paragraph 2.4 of Section 2 hereof and such default shall continue for a period of fifteen (15) days after notice from AET to TCA specifying the default and requiring that the same be remedied, provided, however, that the occurrence of such default shall not take effect if the default complained of shall be of such a nature that it cannot be cured or remedied within said

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fifteen (15) day period and if TCA shall have diligently commenced taking appropriate steps for the curing of said default within said fifteen (15) day period and shall thereafter with reasonable diligence and in good faith have proceeded to remedy such default; or

(e) if TCA shall:

(i) consent to the appointment of a receiver, trustee or liquidator of TCA or of all or a substantial portion of its assets,

(ii) be adjudicated a bankrupt or become insolvent or file a voluntary petition in bankruptcy or admit in writing its inability to pay its debts as they become due,

(iii) make a general assignment for the benefit of creditors,

(iv) file a petition or answer seeking reorganization or an arrangement with creditors or

(v) file an answer admitting the material allegations of a petition filed against TCA in any bankruptcy, reorganization or insolvency proceeding,

or corporate action shall be taken by TCA for the purpose of effecting any of the foregoing; or

(f) if an order, judgment or decree shall be entered, upon the application of a creditor or creditors, by any court of competent jurisdiction, approving a petition seeking reorganization of TCA or appointing a receiver, trustee or liquidator of TCA or of all or a substantial part of its assets, and such an order, judgment or decree shall continue unstayed and in effect for a period of sixty (60) consecutive days;

then in the happening of any of the foregoing Events of

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Default AET shall have the remedies set forth in Section 9.2.

Section 9.2—Remedies

If one or more events of default enumerated in Section 9.1 shall occur, and while such event of default shall be continuing, then in any such event:

A. AET may by notice to TCA specifying the event of default terminate the term of this Agreement and any lease entered into pursuant hereto (including the obligation of AET to deliver to TCA any aircraft not theretofore delivered) effective immediately and TCA immediately shall redeliver the aircraft at John F. Kennedy International Air Port, New York City, or such other air port as may be designated by AET and TCA shall no longer have any rights of any kind whatsoever with respect to the aircraft except as expressly provided herein under this Agreement.

B. AET irrespective of whether it shall have terminated this Agreement and any lease entered into hereunder may on three (3) days notice specifying the event of default take possession of the aircraft wherever situated and hold and deal with the same as if this Agreement and any lease made hereunder had not been made.

C. In addition to all amounts then due and payable by TCA, all amounts accrued under any of the provisions of this Agreement with respect to the aircraft to the date of the later of (i) any termination under Clause A above, or (ii) any redelivery under Clause A above, or (iii) any repossession under Clause B above, shall become due and be paid immediately by TCA.

D. TCA shall immediately pay AET upon demand from time to time (i) all expenses of repossession of the aircraft and redelivery thereof to John F. Kennedy International Airport, New York City, including but not limited to legal expenses, at-

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torneys' fees, storage, maintenance and repair, insurance and ferry costs, (ii) all expenses of restoring the aircraft to the condition required hereunder at redelivery, and (iii) all expenses of performing all other obligations required to be performed by TCA hereunder prior to or at redelivery of the aircraft.

E. AET may at any time or from time to time lease the Aircraft or any of the aircraft in the name of TCA or AET or otherwise to other persons for such term or terms (which may be less than, equal to, or in excess of the period which otherwise would have constituted the balance of the Term of this Agreement) and on such conditions as AET may in its sole discretion determine and AET may collect and receive the rents and payments therefor. AET may without notice to TCA make such alterations, replacements, repairs or modifications to any of the aircraft as AET in AET's sole judgment considers advisable in connection with any such letting of the aircraft. The expenses of such alterations, repairs, replacements or modifications shall be immediately payable by TCA to AET upon demand. AET shall in no way be responsible or liable for any failure to lease the aircraft to others hereunder, or for any failure (other than an arbitrary or wilful failure) to collect any sums due in the event of such letting.

F. (a) TCA shall continue liable to pay to AET on their respective due dates as if there had been no termination or repossession all payments in respect of each aircraft (whether delivered or undelivered) otherwise payable by or accruable against TCA under this Agreement up to and including the date on which the term of this Agreement as the same may be extended as provided for herein would otherwise have expired (herein referred to as the "Expiration Date"). Said payments are hereinafter called "Remaining Payments". For the purpose of this Clause F, the term of the lease of any undelivered Aircraft shall be deemed to have commenced on the date of delivery of said aircraft by Boeing to AET, or if the same does not occur during an available period, at the commencement of the next

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Available Period immediately following such delivery (herein referred to as the "date of delivery"). Against and to the extent of the Remaining Payments with respect to each Aircraft there shall be credited:

(i) any accrued portions thereof paid pursuant to Clause C above;

(ii) The net proceeds received by AET from any letting of the aircraft effected pursuant to Clause E above during and for any available period up to the Expiration Date (but in no event shall the net proceeds of any letting of the aircraft effected pursuant to Clause E above be credited for any aircraft for a period of more than five (5) months during each available period) after deducting all AET's expenses in connection therewith including without limitation brokerage commissions, legal expenses, attorneys' fees, ferrying charges, insurance, cost of repairs, replacements, maintenance and overhaul to the extent that they are unrecovered from any lessee or by reason of insurance.

(iii) Fifty percent (50%) of the base rent or adjusted base rent provided for hereunder during and for any Available Period (but not in excess of a period of five (5) months for each aircraft during each Available period) up to the Expiration Date that AET shall use an aircraft for its own operations or that of Aer Lingus.

AET shall be entitled to recover each Remaining Payment as it shall fall due or at its option to recover the Remaining Payments due for an entire Available Period (five (5) months payments) for either or both aircraft at the beginning of such available period. Any suit brought by AET to collect such amount shall not prejudice in any way AET's right to collect the amount payable on any subsequent due date or for an entire subsequent Available Period by a similar proceeding.

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(b) After the Expiration Date, a calculation shall be made as to the aggregate of:

(i) all payments of basic rent and/or adjusted basic rent (minus any credits allowed with respect thereto) received by AET at any time under this Agreement (including those made pursuant to the provisions of this Clause (a) of this subparagraph "F.");

(ii) all net proceeds received by AET from lettings and set-offs as determined in subclause (a)(ii) above; and

(iii) all amounts to which TCA is entitled as a credit determined as provided for in subclause (a)(iii) above,

and AET shall pay to TCA the excess, if any, of the amount arrived at by such calculation over the aggregate of all amounts which AET would have received had there been no termination or repossession as to any of the Aircraft by way of Basic Rent and Adjusted Basic Rent up to the Termination Date provided, however, that it is expressly understood and agreed that AET shall be completely free to sell or otherwise dispose of or use any of the Aircraft in any manner whatsoever irrespective of whether such disposition or use will eliminate or reduce any amount which TCA might otherwise have been entitled to receive under this subclause (b) and that if AET shall have sold any of the Aircraft prior to the Termination Date all payments and proceeds relating to any such sale shall be excluded from all calculations under this subclause (b).

(c) In the event of a sale by AET of any of the Aircraft, TCA's obligation under this Clause "F." with respect to said Aircraft shall be limited to paying AET all amounts due or accrued under this Agreement with respect to the period up to the date of such sale.

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G. At the election of AET at any time after termination or repossession (whether or not AET shall have collected any amounts pursuant to any clause hereof) AET shall be entitled to recover from TCA and TCA shall pay to AET on demand as damages for the loss of the bargain and not as a penalty the sum of the following:

(a) An amount equal to the excess of the Remaining Payments with respect to the aircraft (whether delivered or undelivered) over the fair and reasonable net rental value of the Aircraft for the period from the date of the exercise by AET of the option contained in this Clause "G" (or in the case of an undelivered aircraft from the date of delivery of said aircraft) up to the Expiration Date discounted at the rate of 6% per annum applied semi-annually; and

(b) Any unpaid amounts due and payable under Clauses "C", "D", "E" and "F" hereof.

Such amount shall be payable on demand and shall bear interest at the rate of 6% per annum from such demand until payment. Upon receipt of such payment together with any interest then due, TCA's obligations to make any further payments to AET under this ¶ "9.2" shall cease and determine.

In addition, AET may proceed to protect and enforce its rights by any action, suit or proceedings (in equity or at law) whether for specific performance of any covenants or agreement or in aid of the exercise of any power granted by this Agreement.

Except as specifically provided herein the remedies in this Agreement shall not be deemed exclusive but shall be cumulative and may be exercised from time to time and as often and in such order as AET may deem expedient and the exercise of any remedy with respect to one aircraft shall not prevent the exercise of other remedies with respect to the other aircraft. No delay or omission by AET in the exercise of any right or power accruing upon an event of default shall impair any such right or power

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or shall be construed to be a waiver of such event of default or acquiescence therein.

TCA hereby expressly waives the service of notice of intention to institute legal proceedings to that end, and also waives any and all rights of redemption granted by any present or future laws.

* * *

SECTION 11: REPRESENTATIONS AND WARRANTIES OF TCA

TCA represents, warrants and covenants to AET:

11.1—TCA is a corporation duly organized, validly existing and in good standing under the laws of the State in which it is incorporated and is duly qualified and authorized to do business wherever the nature of its activities or properties require such qualification and authorization and is a certificated air carrier.

11.2—TCA has full power, authority and legal right to execute, deliver and perform the terms of this agreement and any lease to be entered into pursuant hereto. This agreement and any lease to be entered into pursuant hereto have been duly authorized by all necessary corporate action of TCA and constitute and will constitute with respect to any such lease the valid and binding obligation of TCA enforceable in accordance with their terms.

11.3—There is to its knowledge no law, governmental rule, regulation or order and no charter, by-laws, debenture or preference share provision of TCA and there is no provision in any existing mortgage, indenture, contract or agreement binding on TCA which would be contravened by the execution, delivery or performance by TCA of the terms of this agreement and any lease to be entered into pursuant hereto.

11.4—No consent of the shareholders of TCA or the Trustee or holders of any indebtedness of TCA is or will be required as a condition to the validity of this Agreement or any leases entered into pursuant hereto or if required all such consents have been duly obtained and certified copies thereof delivered to AET.

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11.5—No registration with, giving of notice to or consent or approval of any governmental agency or commission is necessary for the execution, delivery or performance by TCA of the terms of this Agreement or any lease to be entered into pursuant hereto or for the validity or enforceability thereof or with respect to the obligations of TCA thereunder insofar as TCA is concerned or if required, TCA shall use its best efforts to promptly obtain all such registrations, notices, consents and approvals and will furnish copies thereof to AET.

11.6—Neither the execution nor delivery of this Agreement or any lease entered into pursuant hereto nor fulfillment of or compliance with the terms and provisions thereof will contravene any provision of law including without limitation thereto any statute, rule, regulation, judgment, decree, order, franchise or permit applicable to TCA or any of its subsidiaries or conflict with or result in a material breach of the terms, conditions or provisions of or constitute a default under the charter or by-laws of TCA or any of its subsidiaries or any agreement or instrument to which TCA or any of its subsidiaries is now a party or by which any of their properties may be bound or affected.

* * *

property may be bound or affected except to the extent that the approval of the Export-Import Bank of Washington and the Boeing Company and the Civil Aeronautics Board is needed for this Agreement.

[12]C. Anything contained in this Agreement to the contrary notwithstanding, the obligation of AET to make delivery of each Aircraft to TCA in accordance with the terms of the leases entered into pursuant hereto is subject to the condition with which TCA agrees to comply that at the time of each delivery there shall exist no Event of Default under Section 9.1 hereof and no condition, event or act which with notice or laps

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of time or both would constitute any such Event of Default and none of the events specified in Section 9.2 shall have occurred.

* * *

SECTION 13: MISCELLANEOUS

13.1—*Consent of Export-Import Bank, The Boeing Company and the Civil Aeronautics Board:*

This Agreement shall be subject to the approval of the Export-Import Bank of Washington and the Boeing Company and in the event that said Export-Import Bank of Washington and the Boeing Company do not approve the provisions of this Agreement within ninety days from the date hereof, this Agreement shall be of no further force and effect except that AET shall return to TCA any moneys which TCA may have paid to AET pursuant to the provisions of this Agreement without any interest thereon. This Agreement shall be subject to the approval of the Civil Aeronautics Board, if required. In the event that the Civil Aeronautics Board, if its approval is required, does not approve the provisions of this Agreement, this Agreement shall be of no further force and effect except that AET shall return to TCA any monies which TCA may have paid to AET pursuant to the provisions of this Agreement without any interest thereon. If such approval is required TCA shall file the necessary applications to secure such approval. AET and TCA will notify each other promptly of all such approvals and furnish copies to the other.

13.2—*Recordation of Leases*

TCA shall at its own expense and responsibility cause each lease executed pursuant hereto so far as permitted by applicable law or regulations to be kept, filed and recorded at all times in the Office of the Federal Aviation Agency in Oklahoma City, Oklahoma and in such other places whether within or without the United States of America as may be necessary or as AET may reasonably request to perfect and preserve AET's rights hereunder and shall on request furnish to AET an opinion of counsel

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or other evidence satisfactory to AET of each such filing and recordation.

13.3—Assignment by AET

All or any of the right, title and interest of AET herein and in and to any lease entered into pursuant hereto and all of the rights, benefits and advantages of AET thereunder including the rights to receive payment of rental or any other payment thereunder and title to the Aircraft subject to this Agreement and any lease entered into pursuant hereto may be assigned or transferred by AET and re-assigned or re-transferred by any assignee of AET at any time and from time to time provided that any such assignment or transfer shall not release AET of its obligations hereunder or under any lease.

13.4—Further Assurances

TCA and AET shall from time to time do and perform such other and further acts and execute and deliver any and all other and further instruments as may be required by law or reasonably requested by the other to establish, maintain and protect the respective rights and remedies of the other and to carry out and effect the intents and purposes of this Agreement and any lease made pursuant hereto.

13.5—Condemnation of the Aircraft

In the event of any seizure, condemnation, requisition or other permanent taking of possession of either or both of the Aircraft by either the Government of the United States or any agency or political subdivision thereof or by the Government of Ireland, then:

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13.7—Arbitration

Except as herein provided to the contrary in Section 9.2, any dispute concerning the validity, interpretation or application of this agreement, or any amendments thereto, or concerning any rights or obligation based on or in relation to such agreement and which cannot be resolved by the parties hereto, shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association.

13.8—Law Governing

This agreement shall be construed and performance hereof shall be determined in accordance with the laws of the State of New York, U. S. A. Any provision hereof prohibited by or unlawful or unenforceable under any applicable law of any jurisdiction shall as to such jurisdiction be ineffective without modifying the remaining provisions of this agreement. Where, however, the provisions of any such applicable law may be waived, they are hereby waived by AET and TCA to the full extent permitted by law to the end that this agreement and any lease entered into pursuant hereto shall be deemed to be a valid, binding agreement enforceable in accordance with its terms.

13.9—Delay in Exercise of Remedy

No delay or omission in the exercise of any power or remedy herein provided or provided in any lease made pursuant hereto or otherwise available to AET shall impair or affect AET's rights thereafter to exercise the same. Any extension of time for payment or performance hereunder or under any lease made pursuant hereto or other indulgence granted to TCA shall not otherwise alter or affect AET's rights or the obligations of TCA hereunder or under any lease made pursuant hereto. AET's acceptance of any payment or performance after it shall become due hereunder or under any lease made pursuant hereto shall not be

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deemed to alter or affect the obligation of TCA or AET's rights hereunder with respect to any subsequent payment, performance or default.

13.10—To the extent that there is any conflict between the terms of this Agreement or any lease, the terms of this Agreement shall govern including but not limited to any conflict between the right of arbitration under Section 17 of any lease and Section 9 of this Agreement. All of the terms of this Agreement shall be deemed to be part of and incorporated into any lease for the purpose of interpreting the provisions thereof.

13.11—In the event that TCA exercises any option to purchase either or both of the Aircraft under the provisions of any lease it shall not only be obligated to pay the payments provided for under the lease or leases but all additional payments required pursuant to the terms of this Agreement pro rated to the date of payment of the purchase price or prices as appropriate.

* * *

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EXHIBIT 1.

**AIRCRAFT LEASE AGREEMENT
WITH OPTION TO PURCHASE**

THIS AGREEMENT, entered into this day of
19 , by and between TRANS CARIBBEAN AIRWAYS, INC., a
Delaware Corporation having its principal office at 714 Fifth
Avenue, New York, New York (hereinafter referred to as
"TCA") and AERLINTE EIREANN TEORANTA, a corporation
organized and existing under the laws of Ireland, having its
principal office at Dublin Airport, Dublin, Ireland (hereinafter
referred to as "AET").

WITNESSETH:

WHEREAS, TCA desires to lease with option to purchase a
Boeing 747-48 type aircraft from AET, and

WHEREAS, AET is willing to lease such an aircraft to TCA
with an option to purchase the same upon the terms and con-
ditions herein set forth,

NOW, THEREFORE, in consideration of the mutual covenants
herein contained, the parties hereto agree as follows:

1. The Aircraft:

1.1—AET hereby leases to TCA and TCA hereby hires and
takes from AET in an "as is" condition and without representa-
tions or warranties, express or implied, of any kind or nature what-
soever except as hereinafter expressly provided, the Boeing 747-
48 aircraft (hereinafter referred to as "the Aircraft") bearing
Manufacturer's Serial No., including the airframe,
engines and other equipment, instruments, radios and accessories
installed therein or thereon, all as more specifically described in
the Schedule of Manuals attached hereto and made part of this

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Agreement. THE WARRANTIES SET FORTH IN THIS SECTION 1.1 ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES OF AET WHETHER WRITTEN, ORAL OR IMPLIED AND AET SHALL NOT BY VIRTUE OF HAVING LEASED THE AIRCRAFT UNDER THIS LEASE BE DEEMED TO HAVE MADE ANY REPRESENTATIONS OR WARRANTY AS TO THE MERCHANTABILITY, FITNESS, DESIGN OR CONDITION OF OR AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP IN THE AIRCRAFT.

If TCA shall pay the rental provided for hereunder as and when the same becomes due and payable and shall perform and comply with all of the other terms and conditions of this Lease, TCA shall quietly enjoy the Aircraft without hindrance or molestation by AET or by any other person lawfully claiming the same.

AET represents and warrants that:

- (i) AET has valid legal title to the Aircraft free and clear of all liens and encumbrances;
- (ii) AET is fully authorized to enter into this Agreement;
- (iii) at time of delivery to TCA the Aircraft will have a valid Certificate of Airworthiness issued by the Department of Transport and Power of the Government of Ireland;
- (iv) the Aircraft will be in a seating configuration in accordance with AET Drawing Nos.;
- (v) the Aircraft will be in such a condition as will enable TCA to—
 - (a) effect registration under Section 501 of the United States Federal Aviation Act of 1958 as amended;

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(b) obtain and maintain a United States Certificate of Airworthiness throughout the term of this lease subject to TCA's obligations hereunder.

Notwithstanding the foregoing representations and warranties in the event that any of them shall prove to be untrue TCA shall not have any right to recover any damages as a result of the breach thereof, the sole remedy of TCA being to have the rent provided for under the terms of this Lease abate during the period that TCA is unable to use the Aircraft.

2. Term:

The Lease shall commence upon delivery of the Aircraft to TCA on and shall continue from such date until unless terminated sooner as herein provided.

* * *

4. Registration:

4.1—TCA shall, at its expense, use its best efforts to:

(i) effect registration of the Aircraft under Section 501 of the United States Federal Aviation Act of 1958, as amended, and

(ii) obtain and maintain a United States Certificate of Airworthiness subject to AET's obligations hereunder.

5. Use of the Aircraft:

5.1—TCA will employ the Aircraft in a lawful manner in its business as a carrier of passengers and property by air. The Aircraft will:

(a) be operated in accordance with TCA's flight manual and with the recommended operating procedures and operations manual of the manufacturer of the Air-

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craft, its engines, equipment, components or accessories and the applicable United States Federal Aviation Agency Regulations;

(b) be operated by pilots and crew members of known competency and holding valid licenses and other necessary authorizations as may be required by applicable United States Federal Aviation Agency Regulations;

(c) not be used or operated in experimental flights or in training flights other than for TCA crews. However, flights for conversion courses for TCA crews shall be preceded by appropriate simulator training;

(d) not be used or operated in violation of the terms of any insurance policies relating to the Aircraft or its operation or in any geographical area not covered by the policies of insurance required hereunder and then in effect or in a manner which will suspend the coverage of or make applicable any exclusion provision of any such policies;

(e) not be used or operated at any time when the insurance referred to in Article 12 of this Agreement is not in full force and effect;

(f) not be used to transport contraband or illegal narcotics, or hazardous or perilous cargo (other than cargo carried pursuant to applicable government and carrier regulations);

(g) not be used or operated in violation of the laws or regulations of the United States or of any country, state, territory or municipality into or over which TCA may operate;

(h) not be used or operated so that the Aircraft will be deprived of its appropriate airworthiness certificate;

(i) not be used or operated in a manner which will ad-

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versely affect AET's rights under any warranty under the Boeing Agreement or under any agreement obtained by Boeing from the manufacturers pursuant to the terms of the Boeing Agreement.

* * *

any sales, use, gross receipts, occupational or income tax of Ireland. TCA shall assume full responsibility for and indemnify AET against all United States Federal or State or City taxes and customs duties (excluding however any income, franchise and gross receipts taxes) if any, which may arise and for which AET would be liable as Lessor and/or TCA would be liable as Lessee by reason of, upon, measured by or on account of (1) the importation of the Aircraft into the United States, and (2) its use and/or operation and/or lease and/or possession by TCA during the lease period.

10.2—TCA shall not use the Aircraft in violation of any applicable federal, state, municipal or other law or regulation of any country to, from or through or over which it shall use or operate the Aircraft and shall be solely responsible for any fines, penalties, forfeitures and taxes occasioned by any violation thereof and if any such fines, penalties, forfeitures or taxes are imposed upon and paid by AET, TCA shall reimburse AET therefor within ten (10) days after demand by AET.

* * *

12.4—AET hereby indemnifies and holds TCA, its officers, agents and employees, harmless from and against any and all liabilities, claims, demands, suits, judgments, damages and losses, including the costs and expenses and legal fees in connection therewith or incident thereto, for death of or injury to, any officer or employee of AET (provided such death or injury arises out of and in the course of such officer's or employee's employment by AET) caused by or arising out of or in any way connected with

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the condition or use or operation of the Aircraft under this Lease or the performance of this Lease whether or not attributable in whole or in part to the negligence of TCA.

13. *Insurance:*

13.1—During the Lease, TCA shall have and maintain in full force and effect until redelivery of the Aircraft to AET a policy or policies of insurance with responsible insurers in the minimum amounts and containing coverage as follows:

A. *Aircraft Hull Insurance:* All Risks Aircraft Hull Insurance covering the Aircraft for a minimum amount of _____ Dollars U. S. (insert an amount hereinafter called the "minimum amount" which shall not be more than the replacement cost of the Aircraft which shall not be less than the cost of a similar type Aircraft as quoted by Boeing to AET for future delivery not more than sixty (60) days prior to the date of the commencement of this Lease) with AET named as co-insureds with loss payable to AET in the event the Aircraft is a Total Loss. Any amounts of insurance in excess of the minimum amount shall be payable to TCA. Notwithstanding anything else herein contained, the Aircraft shall not be used in any geographical area not covered by the prescribed policies issued to TCA and then in effect. TCA further covenants and agrees that any policies under this Section 13.1.A shall name AET as a named insured, shall be made payable to AET or its assignee if the loss exceeds \$100,000 (and shall be made payable to TCA if such loss is \$100,000 or less) and shall insure AET's interest regardless of any breach or violation by TCA of any warranties, declarations or conditions contained in such policies. The geographic limits, if any, in each and every such policy of insurance shall include as the minimum all territories over which TCA

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will operate the Aircraft for which the insurance is placed.

* * *

15. *Option to Purchase:*

15.1—During the term of the lease TCA shall have the option to purchase the Aircraft at a purchase price of Dollars U. S. (insert amount of hull insurance to be carried on Aircraft pursuant to Section 13 hereof for the benefit of AET plus 15%) by giving sixty (60) days prior written notice of its intention to purchase the Aircraft but any such purchase shall not include the spare engines referred to in Section 7.5. Upon payment of the full purchase price AET shall transfer title to the Aircraft to TCA clear of all mortgages, liens, claims, charges or any other encumbrances and this lease shall terminate as of the date of the payment of the purchase price and all Rental payments provided hereunder shall be prorated to the date of such payment.

16. *Communications:*

16.1—All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given when delivered by hand or registered mail or telegraphed to the party to which such notice or other communication is required or permitted to be given at its address specified below:

AET: Aerlinde Eireann Teoranta
Dublin Airport
Dublin
Ireland

TCA: Trans Caribbean Airways, Inc.
Attn: Executive Vice President
714 Fifth Avenue
New York, New York
U. S. A.

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17. Arbitration:

17.1—Any dispute concerning the validity, interpretation or application of this Agreement or any amendments thereto or concerning any rights or obligations based on or in relation to such Agreement and which cannot be resolved by the parties hereto shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association.

18. Law Governing:

18.1—This Agreement shall be construed and performance hereof shall be determined in accordance with the laws of the State of New York, U. S. A. Any provision hereof prohibited by or unlawful or unenforceable under any applicable law of any jurisdiction shall as to such jurisdiction be ineffective without modifying the remaining provisions of this Agreement. Where, however, the provisions of any such applicable law may be waived, they are hereby waived by AET and TCA to the full extent permitted by law to the end that this Lease shall be deemed to be a valid, binding agreement enforceable in accordance with its terms.

19. Termination of Lease:

19.1—In the event that there is an abatement in Rental pursuant to the provisions of Section 1.1 and such abatement in Rental continues for a period of more than ten (10) days and AET estimates, after consultation with TCA, it will not be able with the exercise of reasonable efforts, to cure such breach of warranty pursuant to the provisions of Section 1.1 within thirty (30) days after such breach occurs AET shall have the right to have the Aircraft redelivered to it within two (2) days after serving written notice thereof on TCA whereupon this Lease shall terminate and neither party shall have any liability hereunder.

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19.2—If notwithstanding TCA's best efforts and for reasons beyond its control

(i) TCA is unable to effect registration of the Aircraft under Section 501 of the U. S. Federal Aviation Act of 1958 as amended, or

(ii) obtain a U. S. Certificate of Air Worthiness, or it is unable to continue to maintain the same, or

(iii) TCA is unable to use the Aircraft in its operations by reason of any United States Law, or Rule or Regulation or other action of any Federal Governmental Agency

and as a result of any of the foregoing (provided that any such inability has not resulted from TCA's breach of its obligations under this Lease), the Aircraft is grounded and the time during which the Aircraft cannot be operated by TCA continues for a period of more than ten (10) days and AET has reasonably estimated, after consultation with TCA, that TCA will not be able to cure such condition within thirty (30) days from the date that such inability commenced, AET shall have the right to have the Aircraft redelivered to it within two (2) days after serving written notice thereof on TCA whereupon this Lease shall terminate and TCA shall have no further liability hereunder. In the event that AET does not exercise its right to have the Aircraft redelivered and such inability continues for a period of thirty (30) days, this Lease shall automatically terminate and neither party shall have any further liability to the other hereunder. TCA shall not be liable for any rental payments hereunder during any period such inability continues in the event that this Lease is terminated as herein provided. In the event, however, that such inability is cured prior to the termination of this Lease, as provided in Section 19, TCA shall be liable for rental payments from the date on which such inability is cured. Any inability caused, arising from

Exhibit A
Excerpts from Agreement

or by reason of a Mandatory Modification or Airworthiness Directive required by the Federal Aviation Agency or required by the Manufacturer of the Aircraft, engines and components or by damage to the Aircraft, shall be excluded from the provisions of this Section 19.2.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

AERLINTE EIREANN TEORANTA

Attest:

By:

Title:

.....

Attest:

TRANS CARIBBEAN AIRWAYS, INC.

By:

Title:

Exhibit A
Excerpts from Agreement

[Letterhead of AERLINTE EIREANN]

Trans Caribbean Airways, Inc.
714 Fifth Avenue
New York,
New York, 10019

LETTER AGREEMENT NO. 1 TO AGREEMENT
BETWEEN AERLINTE EIREANN TEORANTA
AND TRANS CARIBBEAN AIRWAYS, INC.

Gentlemen:

Reference is made to the Agreement (the "Agreement") this day entered into between Aerlinte Eireann Teoranta ("AET") and Trans Caribbean Airways, Inc., ("TCA"), and relating to the leasing with option to purchase of two Boeing 747-48 Aircraft. This letter when accepted by TCA contemporaneously with the execution of the Agreement will evidence our further agreement with respect to the following matters relating to the Agreement.

* * *

(4) *Option to Renew:*

Subject to the approval of the Boeing Company and the Ex/Im Bank of Washington, if required under the terms of AET's Credit Agreement with the Ex/Im Bank of Washington and the Boeing Company, TCA shall have an option to renew the term of the Agreement as may be extended for a further term of five years on the same terms and conditions except as otherwise stipulated hereunder provided that TCA so advises AET not later than two years prior to the expiration of the aforementioned Agreement as same may be extended as provided therein and provided that TCA has not exercised its option to purchase either one or both of the Aircraft. AET shall after the option to

Exhibit A to Item 2

Exhibit A
Excerpts from Agreement

renew has been exercised apply to the Boeing Company and the Ex/Im Bank for approval of such renewal of the Agreement and in the event that such consent or approval of the Boeing Company and Ex/Im Bank of Washington is not obtained within 90 days after the exercise of such option to renew, then the Agreement shall come to an end at the expiration of the principal term and the option to renew shall have no effect. In the event that TCA exercises its option to renew the Agreement,

* * *

(6) Failure to Obtain Necessary Government Approval:

In the event that the approval of any Government Agency is required of the Agreement and such approval is not obtained after the necessary application to secure such approval has been made by TCA and promptly pursued by it, the Agreement shall terminate under the conditions provided for in Section 13.1 of the Agreement. If any of the events stipulated in Section 19.2 of Exhibit 1 of the Agreement occur and as a result of which the lease for the Initial Period is cancelled and, if AET and TCA, notwithstanding their best efforts, are unable to cure the relevant condition, the Agreement shall terminate under the conditions provided for in Section 13.1 of the Agreement.

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Exhibit A
Excerpts from Agreement

If the foregoing correctly sets forth your understanding of our Agreement with respect to the matters hereinabove set forth, please indicate your acceptance and approval below.

Dated as of this 8th day of February, 1968.

AERLINTE EIREANN TEORANTA:

By

Its

ACCEPTED AND AGREED TO:

TRANS CARIBBEAN AIRWAYS, INC.

By

Its

Exhibit A to Item 2

Notice of Motion

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Ludwig A. Saskor sworn to February 6, 1973, and upon all prior papers and proceedings heretofore filed and had herein, defendant will move this Court at a motion term thereof, to be held before the Honorable Inzer B. Wyatt, at Room 1106, United States Courthouse, Foley Square, New York, New York, on February 23, 1973 at 2:30 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure dismissing the complaint, on the grounds:

(a) that the complaint fails to state a claim upon which relief can be granted;

(b) that the complaint constitutes an improper collateral attack on an arbitration award;

(c) that by proceeding in the New York State Supreme Court in the first instance in seeking a stay of arbitration, plaintiff's predecessor in interest chose that Court as the forum for litigating any issues concerning said arbitration and is now precluded from seeking to change that forum;

(d) that in the same New York Supreme Court proceeding which was instituted by plaintiff's predecessor in interest, there are now pending defendant's application to confirm and plaintiff's application to vacate the arbitration award which plaintiff is attacking in this action,

Item 3

Notice of Motion

and this Court should defer to that proceeding as a prior action pending;

(e) that the issues sought to be raised by the complaint could have been raised prior to the arbitration, and by failing to raise these issues prior to the arbitration and thereafter participating in the arbitration plaintiff's predecessor in interest and plaintiff are precluded from attempting to raise these issues after the arbitration; and

(f) that the issues sought to be raised by the complaint were raised in the arbitration proceeding by plaintiff's predecessor in interest and fully litigated and determined therein, and such determination is *res judicata*;

and for such other, further and different relief as the Court may deem just and proper.

Dated: New York, New York
February 6, 1973

To: DEBEVOISE, PLIMPTON,
LYONS & GATES
Attorneys for Plaintiff
299 Park Avenue
New York, New York 10017

Yours, etc.

SMITH, STEIBEL & ALEXANDER

By LUDWIG A. SASKOR
A Member of the Firm

Attorneys for Defendant
460 Park Avenue
New York, New York 10022
PL 1-2660

Item 3

Affidavit of Ludwig A. Saskor

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LUDWIG A. SASKOR, being duly sworn, deposes and says:

1. I am a member of the firm of Smith, Steibel & Alexander, attorneys for defendant. I submit this affidavit in support of defendant's motion under Rule 12 of the Federal Rules of Civil Procedure to dismiss the complaint.

2. The complaint alleges, *inter alia*, that defendant, an Irish air carrier engaged in transatlantic air transportation between Ireland and the United States, and Trans Caribbean Airways, Inc. ("TCA"), a Delaware corporation, entered into a five year agreement for the leasing of two Boeing 747 jet aircraft to TCA during the winter season, with rentals aggregating approximately 13 million dollars ("the agreement"); that defendant terminated the agreement on the ground of TCA's default; that thereafter, pursuant to an arbitration clause in the agreement, defendant demanded arbitration and sought in said arbitration a finding of TCA's default; and that an arbitration proceeding was held and an award rendered. Copies of the agreement and the arbitration award, dated January 3, 1973 ("the award"), are annexed as exhibits to the complaint.

3. The complaint also alleges that in order for TCA to operate the aircraft on its routes it was necessary for the aircraft to be registered in TCA's name with the Federal Aviation Administration; that if registration of the aircraft in TCA's name could not be lawfully effected the agreement by its own terms

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had no further force and effect; that on November 3, 1970 the FAA issued an opinion (at times referred to in the complaint as a "ruling") that the aircraft were not lawfully registrable by TCA or plaintiff ("the FAA opinion"); and that therefore the aircraft could not be flown in United States commerce. A copy of the FAA opinion is also annexed as an exhibit to the complaint.

4. The complaint then goes on to allege that "enforcement of the arbitrators' award would permit [defendant] to benefit from a contract, the performance of which would have been unlawful and contrary to public policy [and] contrary to and in violation of the provisions of the Federal Aviation Act." As a second cause of action, the complaint alleges that by virtue of the FAA opinion, performance of the agreement became impossible and therefore defendant suffered no damages on account of TCA's defaults under the agreement. In the prayer for relief, the complaint asks for a declaration that defendant "may not recover any damages or rentals from [plaintiff] or TCA as a result of any default by TCA under the agreement or as a result of the arbitrators' award." A copy of the complaint (excluding exhibits) is annexed hereto as Exhibit A.

5. The grounds of this motion are:

(a) That the complaint fails to state a claim under the Declaratory Judgment Act;

(b) That the complaint constitutes an improper collateral attack on an arbitration award;

(c) That by proceeding in the New York State Supreme Court in the first instance in seeking a stay of arbitration, plaintiff's predecessor in interest, TCA, chose that Court as the forum for litigating any issues concerning such arbitration and plaintiff is precluded from now seeking to change that forum;

(d) That in the same New York Supreme Court proceeding which was instituted by TCA, there are now pending defendant's application to confirm and plaintiff's application to vacate the award, and this Court should defer to that proceeding;

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Affidavit of Ludwig A. Saskor

(e) That the issues sought to be raised by the complaint could have been raised over two years ago when defendant first demanded arbitration, and TCA having failed to raise these issues prior to arbitration and having fully participated in the arbitration, plaintiff is now precluded from seeking to raise these issues;

(f) That in any event the same issues which plaintiff seeks to raise by this action were raised by TCA in the arbitration proceeding and fully litigated and determined therein, and such determination is *res judicata*.

FAILURE TO STATE A CLAIM
UNDER THE DECLARATORY JUDGMENT ACT

6. In essence the complaint seeks, by means of an action under the Declaratory Judgment Act, to overturn an arbitration award which has just been handed down. This does not present "a case of actual controversy" as required by the Declaratory Judgment Act. It is clear on the face of the complaint that the controversy has been determined.

7. That a losing party may be dissatisfied with an award or judgment rendered after a full litigation of the issues, and may not wish to comply with such award or judgment, does not transform a previously litigated and determined controversy into a brand new controversy for purposes of the Declaratory Judgment Act. If the rule were otherwise, there would be no finality to litigation.

8. That the arbitrators awarded no damages and that defendant may seek to collect rentals under the agreement as they fall due (subject to adjustments and credits), does not affect the validity of the foregoing observations. The arbitrators did not award damages, and defendant did not ask for an award of damages, because the agreement spells out in detail the rentals or damages to which the defendant is entitled where it has ter-

Affidavit of Ludwig A. Saskor

minated the agreement by reason of TCA's default. Thus the rentals or damages which defendant is entitled to collect by virtue of the award is merely a matter of computation (Agreement, Sec. 9.2, pages 9-4 through 9-10). Manifestly, in attacking defendant's right to collect rentals or damages by virtue of the award plaintiff is attacking the award itself to the same extent as if the arbitrators had awarded damages.

COLLATERAL ATTACK ON ARBITRATION AWARD

9. The complaint alleges that he award was delivered to plaintiff just a few weeks ago, on January 17 of this year. In alleging that "an arbitration proceeding was held" (para. 9), it tacitly admits that plaintiff and/or TCA participated in the proceeding which led to the award. Both under the United States Arbitration Act and the New York State arbitration statute, there is a prescribed procedure for seeking to vacate or modify an arbitration award. Plaintiff does not purport to bring this action under either statute, and in any event alleges none of the statutory grounds for vacating or modifying an arbitration award.

10. This action is, purely and simply, a collateral attack on an arbitration award. Plaintiff is attempting a stratagem which has been roundly condemned by the courts. If plaintiff has any valid grounds for vacating or modifying the award, plaintiff may pursue those grounds in the prescribed statutory manner and in the proper forum. It should not be permitted to maintain this collateral attack on the award.

PLAINTIFF'S SELECTION OF STATE FORUM

11. Defendant's first demand for arbitration was served September 23, 1970, well over two years ago. The agreement obviously evidences "a transaction involving commerce," and the requisite diversity and jurisdictional amount are present. Therefore, if TCA had any grounds for staying arbitration, it had the choice of moving either in the State Court or in this Court. TCA

Affidavit of Ludwig A. Saskor

did move to stay arbitration, and elected to institute its proceeding in the New York State Supreme Court. At the time this election was made, the merger agreement had been signed and the merger approved by the directors and stockholders of both companies. In addition, as hereafter noted, TCA was receiving financial assistance from plaintiff and the motion to stay arbitration was handled by plaintiff's lawyers and apparently paid for by plaintiff. The details of the State Court proceeding are set forth below.

12. On October 2, 1970 TCA instituted in the New York Supreme Court a proceeding to stay arbitration and for a declaratory judgment declaring that TCA was entitled to a refund of advance payments made under the agreement and that it had no further obligation to defendant thereunder. A copy of TCA's petition and the accompanying order to show cause is annexed hereto as Exhibit B.

13. By order entered October 13, 1970, the New York Supreme Court granted TCA's petition on the limited ground that defendant's arbitration demand failed to specify the matters in dispute, without prejudice to defendant's right to serve a new arbitration demand. A copy of that order is annexed hereto as Exhibit C.

14. Pursuant to the foregoing decision, on October 15, 1970 defendant served a new demand for arbitration. A copy of that demand is annexed hereto as Exhibit D. On October 23, 1970, TCA again moved in the New York Supreme Court to stay arbitration and for a declaratory judgment. A copy of TCA's amended petition and the accompanying order to show cause is annexed hereto as Exhibit E. The amended petition and second order to show cause are in substance the same as the original petition and order to show cause.

15. On December 7, 1970 the New York Supreme Court issued a decision denying the motion to stay arbitration and holding, *inter alia*, that the issues raised by TCA's declaratory judgment cause of action were covered by the arbitration clause

Affidavit of Ludwig A. Saskor

in the agreement and were for the arbitrators to determine. A copy of this decision is annexed hereto as Exhibit F. Judgment was entered on the decision on December 16, 1970. A copy of the judgment is annexed hereto as Exhibit G.

16. TCA appealed from the judgment to the Appellate Division which unanimously affirmed the judgment without opinion. Leave to appeal to the New York Court of Appeals was denied. TCA then proceeded to arbitration and participated fully therein. Most of the arbitration proceeding, including all of the hearings, was held subsequent to consummation of the merger of TCA into plaintiff.

PENDING APPLICATIONS IN THE STATE COURT
TO CONFIRM AND VACATE THE AWARD

17. On January 3, 1973 the arbitrators rendered the award which plaintiff is attacking in this action. The award was delivered to the parties on January 17, 1973. Two days later, on January 19, defendant moved to confirm the award by order to show cause served the same date. The motion to confirm was brought in the New York Supreme Court. As required by Section 7502(a) of the New York Civil Practice Law & Rules, the motion was made in the same proceeding which had been instituted by TCA when it first sought a stay of arbitration and a declaratory judgment. Plaintiff opposed the confirmation motion, and asked the New York Supreme Court to vacate the award on various grounds. The matter was taken under submission by the Court on January 24, 1973, and the respective applications to confirm and vacate the award are presently awaiting decision by that Court. Copies of the paper submitted to the New York Supreme Court by the respective parties are annexed hereto as Exhibits H and I (excluding exhibits, and excluding defendant's reply affidavit, which deals solely with plaintiff's application to vacate the award).

18. Once TCA instituted a proceeding in the New York Supreme Court seeking to stay arbitration, that proceeding con-

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tinued as a single proceeding for all matters relating to the arbitration, including applications to confirm, modify or vacate the award. Thus plaintiff should be barred from attempting to attack the award in this Court, both on the ground that plaintiff's predecessor selected the State Court in the first instance and on the ground that the State Court proceeding instituted by plaintiff's predecessor constitutes a prior action pending.

**FAILURE TO RAISE REGISTRABILITY
QUESTION PRIOR TO ARBITRATION**

19. The complaint proceeds on the premise that defendant should not be permitted to enforce the award because the aircraft were not lawfully registrable in the United States and therefore performance of the agreement would have been unlawful and against public policy. These are issues which could have been raised in September 1970, when defendant first demanded arbitration under the agreement. The statute and regulations regarding registration of aircraft were the same then as they are now.

20. For the reasons set forth below, the reference to the FAA opinion adds nothing to the complaint:

(a) The opinion was at best an interpretation of a statute and regulations which had existed in substantially unchanged form for many years prior thereto. The opinion did not purport to make law, and of course could not do so.

(b) Contrary to occasional references in the complaint, the FAA opinion is not a "ruling." This is clear from a reading of the opinion, which as an exhibit to the complaint is a part thereof for all purposes.

(c) TCA's motion to stay arbitration, originally returnable October 28, 1970, was not submitted to the New York Supreme Court until November 12, 1970, more than a week after the FAA opinion. Evidence introduced at the arbitration hearing established that TCA was immediately advised of plaintiff's request for such an opinion, and that TCA received a copy of plaintiff's

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request. In addition, TCA's General Counsel, Emil Rogers, testified that TCA's motion to stay arbitration was handled by plaintiff's lawyers, and that TCA was not billed and did not pay for their services (at the time of the motion TCA was receiving financial assistance from plaintiff under an agreement approved by the Civil Aeronautics Board). The FAA opinion was not brought to the attention of the Court prior to submission of the motion, nor did TCA seek to amend its petition or otherwise assert any alleged non-registrability of the aircraft as a ground for staying the arbitration or issuing the requested declaratory judgment.

(d) The motion to stay arbitration was under submission from November 12 to December 7, 1970. At no time during this period did TCA call the Court's attention to the FAA opinion or assert any alleged non-registrability of the aircraft.

(e) Following issuance of the December 7, 1970 decision which denied a stay of arbitration and held that the issues raised by TCA's declaratory judgment cause of action should be determined by the arbitrators, TCA did not seek reargument of its motion on the ground of the FAA opinion, or on the ground of any alleged non-registrability of the aircraft.

(f) The arbitration hearings did not begin until December 1971, more than a year after issuance of the FAA opinion and nine months after TCA was formally merged into plaintiff in March 1971 (Complaint, para. "1(c)"). At no time during this one year period did TCA or plaintiff seek any further stay of arbitration on the ground of the FAA opinion, or on the ground of any alleged non-registrability of the aircraft. Instead, as hereafter noted, they chose to present the FAA opinion to the arbitrators and to litigate the alleged non-registrability of the aircraft in the arbitration proceeding.

21. Plaintiff first took the position that the aircraft were not lawfully registrable in the United States in July 1970, several months before defendant demanded arbitration. This position

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was taken in a letter to Emil Rogers, Esq., TCA's General Counsel. Mr. Rogers' firm, Rogers & Rogers, was listed as "Of Counsel" on TCA's motion to stay arbitration. A copy of the letter was sent to TCA's house counsel, Edwin H. Keusey. A copy of plaintiff's letter, sent by plaintiff's Assistant General Counsel Richard A. Lempert, is annexed hereto as Exhibit J. In addition, Mr. Rogers testified in the arbitration that he and Mr. Keusey were present at a meeting in August 1970 where plaintiff again advanced its position that the aircraft were not lawfully registrable in the United States, and that he reported the meeting to TCA's Executive Vice President. Thus from the very outset both plaintiff and TCA were aware of the non-registrability argument which is being advanced in this action and which was made, litigated and determined in the arbitration.

22. The foregoing facts establish an effective waiver by plaintiff of any right to assert at this late date any claim or defense based on the argument that the aircraft are not lawfully registrable in the United States.

RES JUDICATA

23. Plaintiff's assertion of illegality was approached in much the same fashion in the arbitration as it is in this action. Just as the complaint seeks to rely on the FAA opinion, TCA's Pre-Hearing Memorandum in the arbitration relied on the FAA opinion. Just as a copy of the FAA opinion is attached as an exhibit to the complaint, a copy of the opinion was attached as an exhibit to TCA's Pre-Hearing Memorandum. Pertinent excerpts from the Pre-Hearing Memorandum are annexed hereto as Exhibit K.

24. TCA first raised the issue of illegality in the arbitration in an Answering Statement and Counterclaim filed with the American Arbitration Association on or about January 25, 1971. In that document, the contention that the aircraft were not lawfully registrable in the United States formed a major part of TCA's defenses and counterclaim. The FAA opinion was also

Affidavit of Ludwig A. Saskor

"Additional Defenses

referred to in the Answering Statement and Counterclaim (the date is erroneously referred to therein as November 2, 1970). A Copy of the Answering Statement and Counterclaim is annexed hereto as Exhibit L. Pertinent excerpts therefrom are set forth below:

"5. * * * In this proceeding AET seeks a declaration as to TCA's defaults in order to hold TCA responsible for damages under the Agreement on the premise that the aircraft could lawfully have been registered in the United States and the Agreement performed, even though the Federal Aviation Administration on November 2, 1970, two months after AET's bad faith termination, ruled that the aircraft could not be so registered.

* * *

"7. AET's claims as to defaults are moot since regardless of whether such defaults occurred TCA's obligations under the Agreement and the Agreement itself would have been terminated because the aircraft were not lawfully registrable in the United States.

* * *

"8. For the reasons stated above AET is not entitled to a declaration that TCA was in default under the Agreement. Instead, TCA is entitled to a declaration that AET in bad faith terminated the Agreement and that in any event TCA has no further obligations under the Agreement since the aircraft could not lawfully have been registered in the United States.

* * *

"TCA's Counterclaim for Relief

"10. By reason of AET's conduct as described above, TCA is entitled to a declaration that the Agreement is

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terminated, that it has no further obligations thereunder, and that it is entitled to a refund of advance payments previously made plus interest, together with such other and further relief as may be appropriate. In the alternative, TCA is entitled to such a declaration because the aircraft were not lawfully registrable in the United States."

25. The arbitration hearings began in December 1971 and continued intermittently until July 1972. There were thirty days of hearing in all, and close to 6,000 pages of transcript. Over 200 exhibits were introduced into evidence. All three arbitrators were lawyers.

26. Three of TCA's witnesses, purporting to testify in part as expert witnesses, testified on direct examination that in their opinion the aircraft were not lawfully registrable in the United States (all three witnesses were thoroughly discredited on cross-examination and examination by the arbitrators). In addition, TCA introduced the FAA opinion into evidence. (The opinion itself was thoroughly discredited by other evidence brought out at the hearing, including, *inter alia*: that plaintiff had framed its request for the opinion in such a way as to invite an opinion that the aircraft were not registrable; that plaintiff's request gave a misleading and incomplete statement of the facts; that at the time plaintiff presented its request to the FAA it also presented the FAA with an oral and written opinion of plaintiff's counsel that the aircraft were not registrable, but neglected to advise the FAA of the contrary opinion of defendant's counsel; that the FAA opinion was directly contrary to long standing FAA practice and directly contrary to prior opinions of the FAA which interpreted the same statute and same regulations; and that in fact less than a month prior to plaintiff's request, FAA counsel at the FAA Aircraft Registry—the FAA office which handles registration of aircraft and deals with registration questions—had examined the agreement and had given a verbal opinion that the aircraft were registrable.)

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Affidavit of Ludwig A. Saskor

27. Following the close of the hearings, TCA submitted a Post-Hearing Memorandum which again asserted that the aircraft were not lawfully registrable in the United States. The Post-Hearing Memorandum also asserted, as asserted in the second cause of action of the complaint herein, that defendant could not recover damages under the agreement because the agreement could not have been performed and defendant could have secured no rentals therefrom. Pertinent excerpts from plaintiff's Post-Hearing Memorandum are annexed hereto as Exhibit M. Defendant also argued the registration issue in its closing Brief, where it was pointed out, *inter alia*, that the FAA opinion was not binding on the parties, the Courts or even the FAA itself; and that in view of prior long-standing FAA practice and prior FAA interpretations of the law contrary to the FAA opinion of November 3, 1970, if that opinion were to be taken as a statement of the law it would constitute a change in the FAA's prior interpretation of the law and as such could not serve as a basis for relieving TCA of its obligations under an agreement entered into several years prior to such change. Pertinent excerpts from defendant's closing Brief are annexed hereto as Exhibit N.

28. After the submission of closing briefs the arbitrators heard oral argument. Thereafter, they deliberated for over two months and on January 3 rendered their decision in the form of the award. The award, *inter alia*, dismissed plaintiff's counterclaim and stated that it was "in full settlement of all claims and counterclaims submitted to this Arbitration."

29. Under the foregoing facts, it is clear that the issues which plaintiff seeks to raise in this Court by its declaratory judgment action are issues which plaintiff submitted to the arbitrators and which were fully litigated in the arbitration and determined adversely to plaintiff. Any objection to that determination can be asserted if at all only by a motion to vacate or modify the award pursuant to the applicable statutory provisions. Plaintiff has asked the New York Supreme Court to vacate the award. Plain-

Affidavit of Ludwig A. Saskor

tiff's attempts to attack the award on all fronts and in all Courts should be rejected by this Court.

30. It may be appropriate to note that with respect to the second cause of action which alleges that defendant "suffered no damages" by reason of TCA's default, there is still an additional reason why this cause of action fails to state a claim: the agreement, which is made a part of the complaint, fixes the rentals or damages which defendant is entitled to collect where the agreement has been terminated because of TCA's default (Section 9.2, pages 9-5 through 9-10). This being the case, the amount of defendant's actual damages is not relevant.

WHEREFORE, it is respectfully requested that the complaint be dismissed, and that defendant have such other, further and different relief as the Court may deem just and proper.

LUDWIG A. SASKOR
Ludwig A. Saskor

(Sworn to by Ludwig A. Saskor on February 6, 1973.)

Exhibit A
Complaint for Declaratory Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff American Airlines, Inc. ("American"), by its attorneys, Debevoise, Plimpton, Lyons & Gates, alleges as follows:

JURISDICTION AND VENUE

1. This is an action for a declaratory judgment brought pursuant to 28 U. S. C. § 2201, and arises under the Federal Aviation Act, 49 U. S. C. § 1302 *et seq.* Jurisdiction is based on 28 U. S. C. §§ 1331 and 1337 and is also founded on diversity of citizenship and amount, 28 U. S. C. § 1332(a), in that:

(a) American is a corporation organized under the laws of the State of Delaware and has its principal place of business in the State of New York. American is and at all times material to this action was a common carrier by air engaged in interstate and foreign commerce and subject to the provisions of the Federal Aviation Act.

(b) Defendant Aerlinte Eireann Teoranta ("AET") is a government-owned Irish airline and has its principal place of business in Ireland, and is engaged in transatlantic air transportation between points in Ireland and points in the United States, including New York City.

(c) Trans Caribbean Airways, Inc. ("TCA") was a Delaware corporation which on March 8, 1971 was merged into American.

(d) The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.

Exhibit A to Item 3

Exhibit A
Complaint for Declaratory Judgment

2. AET maintains an office for the transaction of business in New York and is subject to the jurisdiction of this Court. This action arises out of an agreement the terms of which were negotiated in whole or in substantial part in the City, County and State of New York, and which was to be performed in substantial part in the City, County and State of New York.

3. Venue in this District is proper under 28 U. S. C. § 1391(a) in that American has its principal place of business in this District, AET is transacting business in this District, and the claim involved herein arose in this District.

FIRST CAUSE OF ACTION

4. On or about February 8, 1968, AET and TCA entered into a written agreement (the "Agreement"), pursuant to which AET was to lease to TCA two Boeing 747 jet aircraft. A copy of the Agreement is annexed hereto as Exhibit A.

5. The Agreement contemplated that AET would purchase both aircraft, new, from The Boeing Company for use during AET's heavy summer season and would lease them to TCA during winter seasons. Boeing was to deliver the first aircraft to AET about November 9, 1970, and under the Agreement AET was to lease this aircraft immediately to TCA from November 1970 until April 1971. Thereafter the first aircraft was to be leased for four additional winter seasons. The second aircraft, to be delivered by Boeing in the spring of 1971, was to be used that spring and summer by AET and then leased to TCA for four winter seasons, beginning in November 1971. The base rental for each aircraft was approximately \$280,000 per month (subject to various adjustments), and the aggregate of all rentals under the Agreement approximated \$13 million.

6. In order for TCA to have operated the aircraft on its routes, it was necessary for the aircraft to be registered with the

Exhibit A to Item 3

Exhibit A
Complaint for Declaratory Judgment

Federal Aviation Administration ("FAA") in the name of TCA pursuant to Section 501 of the Federal Aviation Act, 49 U. S. C. § 1401 and the applicable FAA regulations.

7. If registration of the aircraft in the name of TCA could not be lawfully effected, the Agreement by its own terms had no further force or effect.

8. On September 2, 1970, AET terminated the Agreement on the ground that TCA was in default under the Agreement by reason of TCA's failure in a timely manner to make an advance payment of \$85,000 and to execute the first seasonal lease under the Agreement.

9. In October 1970, AET filed a Demand for Arbitration pursuant to Section 13.7 of the Agreement and asked for a determination that TCA was in default under the Agreement. An arbitration proceeding was held, and on January 17, 1973 the arbitrators issued an award, dated January 3, 1973. The award stated that as of September 2, 1970 there were three events of default on the part of TCA (including one not assigned by AET in September 1970 as a ground for termination) and that AET had "followed proper procedure in effectuation of cancellation". A copy of the arbitrators' award is attached hereto as Exhibit B.

10. The arbitrators' award did not make any finding or determination of damages, if any, to which AET might be entitled as a result of TCA's default.

11. On November 3, 1970, two months after the AET had terminated the Agreement, the Federal Aviation Administration ruled in effect that the AET aircraft could not and cannot be lawfully registered by TCA or American and, hence, could not, and cannot, be flown in United States commerce. A copy of the FAA's opinion is attached hereto as Exhibit C.

Exhibit A to Item 3

Exhibit A
Complaint for Declaratory Judgment

12. AET has asserted that, pursuant to the Agreement, it is entitled to past rentals and to future rentals, as they become due, subject to certain adjustments and credits.

13. Enforcement of the arbitrators' award would permit AET to circumvent the aforesaid FAA ruling and permit AET to benefit from a contract, the performance of which would have been unlawful and contrary to public policy. Further, such enforcement would be contrary to and in violation of the provisions of the Federal Aviation Act.

SECOND CAUSE OF ACTION

14. American repeats and realleges the allegations contained in paragraphs 1 through 13 of the complaint as if fully set forth herein.

15. As of November 3, 1970, when the FAA rendered the aforesaid opinion, performance of the Agreement between the parties became impossible.

16. The lease of the first aircraft would not be commenced until on or about November 9, 1970 and no rents would have become due under the Agreement or initial lease until some time thereafter.

17. AET suffered no damages on account of TCA's defaults under the Agreement.

18. By reason of the foregoing, an actual controversy of a justiciable nature exists between the parties.

Exhibit A
Complaint for Declaratory Judgment

PRAYER FOR RELIEF

WHEREFORE, American prays that this Court declare that AET may not recover any damages or rentals from American or TCA as a result of any default by TCA under the Agreement or as a result of the arbitrators' award, and that this Court grant to American such other and further relief as to the Court seems just and proper in the premises.

DEBEVOISE, PLIMPTON, LYONS & GATES

By **STANDISH F. MEDINA, JR.**
A Member of the Firm
Attorneys for Plaintiff,
American Airlines, Inc.
299 Park Avenue
New York, New York 10017
752-6400

Exhibit B
Order to Show Cause

At a Special Term, Part II, of The Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, 60 Centre Street, New York, N. Y., on the 2nd day of October, 1970.

Index No. 16308—1970

In The Matter of The Application of

TRANS CARIBBEAN AIRWAYS, INC.,

Petitioner,

For A Judgment Staying The Arbitration Commenced by
Aerlinite Eireann Teoranta, And For A Declaratory Judgment

vs.

AERLINTE EIREANN TEORANTA and AMERICAN ARBITRATION
ASSOCIATION, INC.

Respondents.

PRESENT: HON. PAUL A. FINO, SR., Justice.

Upon reading and filing of the annexed verified petition of Trans Caribbean Airways, Inc., duly verified the 1st day of October, 1970, and upon the Demand for Arbitration herein dated September 23, 1970, let Aerlinite Eireann Teoranta, the respondent herein, Show Cause at a Special Term, Part I, of this Court, appointed to be held in and for the County of New York, at the County Courthouse at 60 Centre Street, Borough of Manhattan, City, County and State of New York on the 7th day of October, 1970, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made staying the arbitration between Aerlinite

Exhibit B to Item 3

Exhibit B
Order to Show Cause

Eireann Teoranta and Trans Caribbean Airways, Inc., and all proceedings therein, pursuant to CPLR §§ 7502(a), 7503(b) and (c), upon the ground that no agreement was made to arbitrate the issues sought to be arbitrated and upon the further ground that the Demand for Arbitration is defective and improper, and why petitioner should not have such other and further relief as to this Court may seem just and proper, and it is further

ORDERED that said arbitration between Aerlinte Eireann Teoranta and Trans Caribbean Airways, Inc. and all proceedings therein be and the same are hereby stayed until this application is determined, and sufficient reason appearing therefor, let service of a copy of this Order, together with the papers upon which this Order is granted, upon respondents Aerlinte Eireann Teoranta and American Arbitration Association, Inc., at their respective offices in the City of New York, in accordance with CPLR Rule 2103, on or before the 2nd day of October 1970, be deemed sufficient.

Enter,

P. A. F.
Paul A. Fino, Sr.
J. S. C.

Exhibit B
Verified Petition for Stay of Arbitration and for
Declaratory Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[SAME TITLE]

The petition of Trans Caribbean Airways, Inc. ("TCA"), by its attorneys Debevoise, Plimpton, Lyons & Gates, alleges and respectfully shows to this Court as follows:

STAY OF ARBITRATION

1. TCA is a corporation organized and existing under the laws of the State of Delaware, qualified to do business in the State of New York, and with its principal office and place of business at 714 Fifth Avenue, Borough of Manhattan, City, County and State of New York.

2. Upon information and belief, respondent Aerlinte Eireann Teoranta ("AET") is a corporation organized and existing under the laws of Ireland, having its principal office and place of business at Dublin Airport, Dublin, Ireland, and an office and place of business at 464 Fifth Avenue, Borough of Manhattan, City, County and State of New York.

3. Upon information and belief, respondent American Arbitration Association, Inc. ("AAA") is a non-profit corporation organized and existing under the laws of the State of New York, with offices at 140 West 51st Street, Borough of Manhattan, City, County and State of New York.

4. This petition is submitted, pursuant to CPLR §§ 7502(a), 7503(b) and (c) to stay an arbitration between TCA and AET described in a notice of intention to arbitrate entitled "Demand

Exhibit B to Item 3

Exhibit B
Verified Petition for Stay of Arbitration and for
Declaratory Judgment

for Arbitration" (the "Demand") dated September 23, 1970, signed by Leonard H. Steibel, Esquire, attorney for AET, and served upon petitioner on the same date. A copy of said Demand is attached hereto as Exhibit A and made a part hereof.

5. The bases for this petition, as set forth in more detail below, are (I) that no agreement was made to arbitrate the issues sought to be arbitrated; and (II) the Demand is defective in that it fails to set forth the nature of the dispute, the amount involved, if any, and the remedy sought.

I

6. By a written agreement entered into on the 8th day of February, 1968 by and between TCA and AET (the "Agreement"), TCA agreed to lease from AET two Boeing aircraft model 747-48. The first such aircraft was scheduled for delivery in November, 1970 and was to be leased from that time until May 15, 1971. Thereafter this same aircraft was to be leased under four separate leases, for each of the four next succeeding winter seasons, from October 15, until the following May 15, subject to certain period adjustments. The second aircraft was similarly to be leased for each of the four next succeeding winter seasons commencing in the fall of 1971. The initial rental for each aircraft was to be \$280,000 per month, subject to various adjustments.

7. Section 2.4 of the Agreement provided that not later than sixty (60) days prior to the commencement of a particular lease period, TCA and AET would execute, for each aircraft, a lease for such period in the form attached as an exhibit to the Agreement.

8. Section 5.1 of the Agreement provided that TCA would make certain advance payments to AET totalling \$500,000 as follows:

Exhibit B to Item 3

Exhibit B
Verified Petition for Stay of Arbitration and for
Declaratory Judgment

| | |
|---|-----------|
| (a) On September 21, 1967 | \$ 50,000 |
| (b) On signing the Agreement | 200,000 |
| (c) On January 1, 1969 | 85,000 |
| (d) On July 1, 1969 | 85,000 |
| (e) On delivery of the first aircraft | 80,000 |
| | <hr/> |
| Total | \$500,000 |

Section 5.3 of the Agreement further provided that said payments, with interest thereon, would be credited against the first rental payments to be made by TCA. TCA made the advance payments called for in (a), (b) and (c) above, aggregating \$335,000, but failed to make the \$85,000 payment due July 1, 1969. Thereafter, TCA sought and received from AET various extensions with respect to said payment and both parties acted on the assumption and understanding, express and implied, that the \$85,000 payment would be made at a later date and that the Agreement would continue in effect.

9. In accordance with such assumption and understanding, AET on July 8, 1970 sent to TCA for execution a lease for the first aircraft for the first lease period, and requested in a covering letter that TCA execute and return the lease to AET within five days. A copy of said letter is attached hereto as Exhibit B and made a part hereof. Under the manufacturer's delivery schedule for the aircraft, the first aircraft was scheduled for delivery on November 8, 1970 and under Section 2.4 of the Agreement TCA was entitled to execute such lease at any time as long as it did so at least sixty (60) days prior to such delivery.

10. On September 2, 1970, AET sent to TCA the following cablegram terminating the Agreement:

"TRANS CARIBBEAN AIRWAYS INC 714 FIFTH
 AVENUE NEW YORK NY

Exhibit B to Item 3

Exhibit B

*Verified Petition for Stay of Arbitration and for
Declaratory Judgment*

ATTN EXECUTIVE VICE PRESIDENT IN VIEW OF
YOUR DEFAULT IN FAILING TO PAY THE SUM
OF EIGHTY FIVE THOUSAND DOLLARS DUE 01
JULY 1969 UNDER OUR AGREEMENT OF 8 FEB-
RUARY 1968 WITHIN FIVE DAYS AFTER NOTICE
FROM US AND IN VIEW OF YOUR FURTHER
DEFAULT IN FAILING TO EXECUTE THE LEASE
FOR PLANE NUMBER ONE TENDERED BY US
PURSUANT TO SAID AGREEMENT WITHIN FIVE
DAYS AFTER NOTICE FROM US WE HEREBY
TERMINATE THE TERM OF SAID AGREEMENT
EFFECTIVE IMMEDIATELY RESERVING ALL
REMEDIES AVAILABLE TO US UNDER SAID
AGREEMENT STOP

AERLINTE EIREANN TEORANTA"

11. On September 3, 1970, TCA replied to AET's attempt to terminate the Agreement by delivering to AET's New York office a letter and check for \$85,000 payable to AET. Copies of said letter and check are attached hereto as Exhibits C-1 and C-2, respectively, and made a part hereof. September 4, 1970, more than sixty (60) days prior to the scheduled delivery date of the first aircraft, TCA executed and transmitted to AET the lease for said aircraft for the 1970-1971 winter season, and on the same date sent a cablegram to AET informing it of the mailing of said executed lease. Copies of TCA's letter and cable are attached hereto as Exhibits D and E, respectively, and made a part hereof.

12. On September 4, 1970, AET's New York counsel returned TCA's \$85,000 check, claiming that the Agreement between the parties had been terminated. Thereafter on September 9, 1970 AET advised TCA that it would not accept the executed

Exhibit B to Item 3

Exhibit B
Verified Petition for Stay of Arbitration and for
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lease transmitted by TCA on September 4, 1970 since AET had terminated the Agreement.

13. On September 23, 1970, as previously alleged in paragraph 4 hereof, AET served the Demand on TCA. The Demand was based on Section 13.7 of the Agreement, which provides as follows:

"13.7—Arbitration. *Except as herein provided to the contrary in Section 9.2*, any dispute concerning the validity, interpretation or application of this agreement, or any amendments thereto, or concerning any rights or obligation based on or in relation to such agreement and which cannot be resolved by the parties hereto, shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association." (Emphasis added.)

Said Section 9.2, a copy of which is attached hereto as Exhibit F and made a part hereof, provides in part that "If one or more events of default enumerated in Section 9.1 shall occur, and while such event of default shall be continuing, then and in any such event . . ." AET may take certain action and seek certain remedies as set forth in said Section. These remedies, some of which are unconscionable, include among other things, immediate repossession of the aircraft, and immediate collection of various rents and expenses. In addition, Section 9.2 states that AET may enforce its rights "by any action, suit or proceeding (in equity or at law)"

14. Since Section 13.7 of the Agreement excepts from arbitration the matters referred to in Section 9.2, there was no agreement between the parties to arbitrate the issue of whether an event of default had occurred, or was continuing, so as to give rise to the remedies provided in Section 9.2 of the Agreement nor was there any agreement between the parties to arbitrate the validity and enforceability of such remedies.

Exhibit B
***Verified Petition for Stay of Arbitration and for
Declaratory Judgment***

II

15. Under Section 13.7 of the Agreement, arbitration of those matters to be arbitrated was to proceed "in accordance with the rules and regulations of the American Arbitration Association." Section 7 of the Commercial Arbitration Rules of the AAA provides in part that the Demand for Arbitration "shall contain a statement setting forth the nature of the dispute, the amount involved, if any, [and] the remedy sought"

16. AET's Demand, attached hereto as Exhibit A, is defective and improper in that it fails to contain a statement setting forth the nature of the dispute and the amount involved, if any. Said Demand asserts only that TCA "failed to perform the terms of the Contract." In addition, the Demand fails to specify the remedy sought since it seeks merely a declaration that TCA was in default under the terms of the Contract and that in terminating the Contract AET followed prescribed procedures, without specifying whether such remedy is all or only part of the remedy AET intends to pursue.

17. Since no agreement was made to arbitrate the issue of whether a default had occurred or was continuing for purposes of Section 9.2 of the Agreement, or the issue of the validity and enforceability of the remedies provided in Section 9.2, and since the Demand is defective in failing to set forth the nature of the dispute, the amount involved, if any, and the remedies sought, the petitioner requests that AET and the AAA be enjoined and stayed from proceeding in the arbitration pending the determination of this proceeding and that, after hearing, a permanent injunction and stay be entered.

18. No previous application has been made for the relief herein sought to this or any other Judge or Court.

Exhibit B
***Verified Petition for Stay of Arbitration and for
Declaratory Judgment***

DECLARATORY JUDGMENT

19. TCA repeats, as if fully set forth at length, the allegations contained in paragraphs 1 through 18 of this petition.

20. By reason of the foregoing AET wrongfully and in bad faith terminated and repudiated the Agreement.

21. A case and controversy exists between TCA and AET as to AET's rights to terminate and repudiate the Agreement and as to the rights of TCA as a consequence of said termination and repudiation.

22. By reason of AET's wrongful termination and repudiation of the Agreement, TCA is entitled to a declaratory judgment that it has no further obligation to AET under the Agreement and that it is entitled to recover from AET the advance payments referred to in paragraph 8 hereof, with interest, and to be compensated for such other damage as TCA may sustain as a result of AET's wrongful acts.

WHEREFORE, petitioner TCA prays that an order be made staying the arbitration between the parties and all proceedings therein on the ground that no agreement to arbitrate the issues in dispute was made by the parties, and on the further ground that the Demand for Arbitration is defective and improper.

Petitioner TCA further prays that a declaratory judgment be entered by the Court declaring

(1) that AET wrongfully terminated and repudiated the Agreement and that TCA has no further obligation to AET thereunder, and

(2) that TCA is entitled to recover from AET the sum of \$335,000, with interest, made as advance payments under the Agreement, and such other damages as TCA may sustain as a result of AET's wrongful acts.

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Exhibit B

*Verified Petition for Stay of Arbitration and for
Declaratory Judgment*

Petitioner TCA further prays for such other and different relief as to this Court may seem just and proper, together with the costs and disbursements of this proceeding.

Dated: New York, New York
October 1, 1970

DEBEVOISE, PLIMPTON, LYONS & GATES
320 Park Avenue
New York, New York
PLaza 2-6400
Attorneys for Trans Caribbean
Airways, Inc.

Of Counsel:

ROGERS & ROGERS
570 7th Avenue
New York, New York
736-3723

Exhibit B to Item 3

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Exhibit B

***Verified Petition for Stay of Arbitration and for
Declaratory Judgment***

Verification

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

J. VINCENT RUSSO, being duly sworn, says that he is the Vice-President-Controller of Trans Caribbean Airways, Inc., the petitioner above named, that he has read and knows the contents of the foregoing petition to stay arbitration and for a declaratory judgment, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

The reason why this verification is made by deponent and not by Trans Caribbean Airways, Inc. is because petitioner is a corporation and deponent is one of its officers, to wit its Vice-President-Controller.

J. VINCENT RUSSO

(Sworn to by J. Vincent Russo on October 1, 1970.)

Exhibit B to Item 3

Exhibit C

**SUPREME COURT OF THE STATE OF NEW YORK
SPECIAL TERM PART I—NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street,
New York, New York 10007**

[SAME TITLE]

PRESENT: HON. MANUEL A. GOMEZ, *Justice*.

The following papers numbered 1 to 17 read on this motion, argued.

No. 173 on Calendar of October 7, 1970

**PAPERS
NUMBERED**

| | |
|--|-------|
| Filed—Order to Show Cause, Exhibits and Affidavits | |
| Annexed | 1-9 |
| Answering Affidavit and Exhibits | 10-15 |
| Replying Affidavit and Exhibit | 16-17 |

Upon the foregoing papers this motion to stay arbitration is granted on the ground that the demand for arbitration is defective and improper. It does not disclose the nature of the dispute. A demand must state the specific issues to be arbitrated (*Nager Electric Co. v. Weisman Constr. Corp.*, 29 AD 2d 939, First Dept.; *Electronic & Missile Facilities Inc. v. Campbell*, 20 AD 2d 891, First Dept.) In making this determination the court does not reach the question whether there exists a valid agreement "to arbitrate the issues sought to be arbitrated."

The foregoing is without prejudice to the service of a proper demand.

Dated: Oct. 9, 1970

MANUEL A. GOMEZ,
J. S. C.

Exhibit C to Item 3

Exhibit D

**AMERICAN ARBITRATION ASSOCIATION, Administrator
Commercial Arbitration Rules
Demand for Arbitration**

October 15, 1970

**TO: TRANS CARIBBEAN AIRWAYS INC.
714 Fifth Avenue
New York, N. Y. 10019**

PLEASE TAKE NOTICE that under Section 7503, Subdivision (c), of the Civil Practice Law and Rules of the State of New York, the undersigned, Aerlinite Eireann Teoranta, pursuant to the provisions of a contract with you dated February 8, 1968 ("the Contract") which provides as follows:

"Except as herein provided to the contrary in Section 9.2 [which provides for the remedies in the event of a default], any dispute concerning the validity, interpretation or application of this agreement, or any amendments thereto, or concerning any rights or obligations based on or in relation to such agreement and which cannot be resolved by the parties hereto, shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association."

hereby demands arbitration thereunder.

NATURE OF DISPUTE: Whether or not, on September 2, 1970, Trans Caribbean Airways Inc. was in default under the Contract in the following respects:

1. Failure and refusal to pay the sum of \$85,000 due July 1, 1969;
2. Failure and refusal to execute the lease tendered by Aerlinite Eireann Teoranta for Plane No. 1;
3. Failure and refusal to use its best efforts to promptly obtain all required registrations with and approvals of governmental agencies;

Exhibit D to Item 3

Exhibit D

4. Failure and refusal to do and perform such other and further acts as required by law and reasonably requested by Aerlinite Eireann Teoranta to carry out and effect the intents and purposes of the Contract and the leases required to be executed thereunder.

CLAIM OF RELIEF SOUGHT: A declaration:

a) that Trans Caribbean Airways Inc. was in default under the terms of the Contract; and

b) that in terminating the term of the Contract Aerlinite Eireann Teoranta followed the procedures prescribed under the Contract.

HEARING LOCALE REQUESTED: New York City, New York.

You are hereby notified that copies of the Contract and of this Demand are being filed with the American Arbitration Association at its New York Regional Office, with the request that it commence the administration of the arbitration. Under Section 7 of the Commercial Arbitration Rules, you may file an answering statement within seven days after notice from the Administrator.

PLEASE TAKE FURTHER NOTICE that unless within ten days after service of this Notice of Intention to Arbitrate, you apply to stay the arbitration herein, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time.

AERLINTE EIREANN TEORANTA

By LEONARD H. STEIBEL
Attorney

SMITH & STEIBEL
460 Park Avenue
New York, N. Y. 10022
PLaza 1-2660

Exhibit D to Item 3

Exhibit E

Order to Show Cause

At a Special Term, Part II, of The Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, 60 Centre Street, New York, N. Y., on the 23rd day of October, 1970.

PRESENT: HON.

, Justice.

[SAME TITLE]

Upon reading and filing of the annexed verified amended petition of Trans Caribbean Airways, Inc., duly verified the 22nd day of October, 1970, upon the Demand for Arbitration herein dated October 15, 1970, and upon all prior papers and proceedings heretofore had herein, let Aerlinte Eireann Teoranta, the respondent herein, Show Cause at a Special Term, Part I, of this Court, appointed to be held in and for the County of New York, at the County Courthouse at 60 Centre Street, Borough of Manhattan, City, County and State of New York on the 28th day of October, 1970, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made staying the arbitration between Aerlinte Eireann Teoranta and Trans Caribbean Airways, Inc., and all proceedings therein, pursuant to CPLR §§ 7502(a), 7503(b) and (c), upon the ground that no agreement was made to arbitrate the issues sought to be arbitrated and upon the further ground that the Demand for Arbitration is defective and improper, and why petitioner should not have such other and further relief as to this Court may seem just and proper, and it is further

ORDERED that said arbitration between Aerlinte Eireann Teoranta and Trans Caribbean Airways, Inc. and all proceedings

Exhibit E to Item 3

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Exhibit E
Order to Show Cause

therein be and the same are hereby stayed until this application is heard, and sufficient reason appearing therefor, let service of a copy of this Order, together with the papers upon which this Order is granted, upon respondents Aerlinte Eireann Teoranta and American Arbitration Association, Inc., at their respective offices in the City of New York, on the 23rd day of October, 1970, be deemed sufficient.

Enter,

X. C. R.

J.S.C.

Exhibit E to Item 3

Exhibit E

**Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

[SAME TITLE]

The amended petition of Trans Caribbean Airways, Inc. ("TCA"), by its attorneys Debevoise, Plimpton, Lyons & Gates, alleges and respectfully shows to this Court as follows:

STAY OF ARBITRATION

1. TCA is a corporation organized and existing under the laws of the State of Delaware, qualified to do business in the State of New York, and with its principal office and place of business at 714 Fifth Avenue, Borough of Manhattan, City, County and State of New York.

2. Upon information and belief, respondent Aerlinnte Eireann Teoranta ("AET") is a corporation organized and existing under the laws of Ireland, having its principal office and place of business at Dublin Airport, Dublin, Ireland, and an office and place of business at 464 Fifth Avenue, Borough of Manhattan, City, County and State of New York.

3. Upon information and belief, respondent American Arbitration Association, Inc. ("AAA") is a non-profit corporation organized and existing under the laws of the State of New York, with offices at 140 West 51st Street, Borough of Manhattan, City, County and State of New York.

4. This amended petition is submitted, pursuant to CPLR §§ 7502(a), 7503(b) and (c) to stay an arbitration between TCA and AET described in a notice of intention to arbitrate

Exhibit E to Item 3

Exhibit E

*Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment*

entitled "Demand for Arbitration" (the "Demand") dated October 15, 1970, signed by Leonard H. Steibel, Esquire, attorney for AET, and served upon petitioner on the same date. A copy of said Demand is attached hereto as Exhibit A and made a part hereof. This amended petition also seeks a declaratory judgment.

5. The bases for this amended petition, as set forth in more detail below, are (I) that no agreement was made to arbitrate the issues sought to be arbitrated; and (II) the Demand is defective in that it fails to state completely all issues of the dispute, the amount involved, if any, and the remedy sought.

I

6. By a written agreement entered into on the 8th day of February, 1968 by and between TCA and AET (the "Agreement"), TCA agreed to lease from AET two Boeing aircraft model 747-48. The first such aircraft was scheduled for delivery in November, 1970 and was to be leased from that time until May 15, 1971. Thereafter this same aircraft was to be leased under four separate leases, for each of the four next succeeding winter seasons, from October 15 until the following May 15, subject to certain period adjustments. The second aircraft was similarly to be leased for each of the four next succeeding winter seasons commencing in the fall of 1971. The initial rental for each aircraft was to be \$280,000 per month, subject to various adjustments.

7. Section 2.4 of the Agreement provided that not later than sixty (60) days prior to the commencement of a particular lease period, TCA and AET would execute, for each aircraft, a lease for such period in the form attached as an exhibit to the Agreement.

Exhibit E
Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment

8. Section 5.1 of the Agreement provided that TCA would make certain advance payments to AET totalling \$500,000 as follows:

| | |
|---|-----------|
| (a) On September 21, 1967 | \$ 50,000 |
| (b) On signing the Agreement | 200,000 |
| (c) On January 1, 1969 | 85,000 |
| (d) On July 1, 1969 | 85,000 |
| (e) On delivery of the first aircraft | 80,000 |
| | <hr/> |
| Total | \$500,000 |

Section 5.3 of the Agreement further provided that said payments, with interest thereon, would be credited against the first rental payments to be made by TCA. TCA made the advance payments called for in (a), (b) and (c) above, aggregating \$335,000, but failed to make the \$85,000 payment due July 1, 1969. Thereafter, TCA sought and received from AET various extensions with respect to said payment and both parties acted on the assumption and understanding, express and implied, that the \$85,000 payment would be made at a later date and that the Agreement would continue in effect.

9. In accordance with such assumption and understanding, AET on July 8, 1970 sent to TCA for execution a lease for the first aircraft for the first lease period, and requested in a covering letter that TCA execute and return the lease to AET within five days. A copy of said letter is attached hereto as Exhibit B and made a part hereof. Under the manufacturer's delivery schedule for the aircraft, AET would not have been able to deliver the aircraft to TCA before November 9, 1970 and under Section 2.4 of the Agreement TCA was entitled to execute such lease at any time as long as it did so at least sixty (60) days prior to delivery from AET.

Exhibit E
Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment

10. On September 2, 1970, AET sent to TCA the following cablegram terminating the Agreement:

"TRANS CARIBBEAN AIRWAYS INC. 714 FIFTH AVENUE NEW YORK N. Y.

ATTN EXECUTIVE VICE PRESIDENT IN VIEW OF YOUR DEFAULT IN FAILING TO PAY THE SUM OF EIGHTY FIVE THOUSAND DOLLARS DUE 01 JULY 1969 UNDER OUR AGREEMENT OF 8 FEBRUARY 1968 WITHIN FIVE DAYS AFTER NOTICE FROM US AND IN VIEW OF YOUR FURTHER DEFAULT IN FAILING TO EXECUTE THE LEASE FOR PLANE NUMBER ONE TENDERED BY US PURSUANT TO SAID AGREEMENT WITHIN FIVE DAYS AFTER NOTICE FROM US WE HEREBY TERMINATE THE TERM OF SAID AGREEMENT EFFECTIVE IMMEDIATELY RESERVING ALL REMEDIES AVAILABLE TO US UNDER SAID AGREEMENT STOP

AERLINTE EIREANN TEORANTA"

11. On September 3, 1970 TCA cabled a reply to AET's attempt to terminate the Agreement. TCA denied it was in default and confirmed its willingness to perform its obligations under the Agreement. A copy of said reply is attached hereto as Exhibit C, and made a part thereof. On September 3, 1970 TCA also delivered to AET's New York office a letter and check for \$85,000 payable to AET. Copies of said letter and check are attached hereto as Exhibits D-1 and D-2, respectively, and made a part hereof. On September 4, 1970, more than sixty (60) days prior to the scheduled delivery date of the first aircraft, TCA executed and transmitted to AET the lease for said aircraft for the 1970-71 winter season, and on the same date sent a cablegram to AET informing it of the mailing of said executed lease. Copies of TCA's letter and cable are attached hereto as Exhibits E and F, respectively, and made a part hereof.

Exhibit E to Item 3

Exhibit E

*Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment*

12. On September 4, 1970, AET's New York counsel returned TCA's \$85,000 check, claiming that the Agreement between the parties had been terminated. Thereafter on September 9, 1970 AET advised TCA that it would not accept the executed lease transmitted by TCA on September 4, 1970 since AET had terminated the Agreement.

13. On September 23, 1970, AET served a Demand for Arbitration on TCA. Said Demand is attached hereto as Exhibit G and made a part hereof.

14. On October 2, 1970, TCA filed its original petition herein seeking (i) an order staying the arbitration between the parties on the ground that no agreement to arbitrate the issues in dispute was made by the parties, and on the further ground that the Demand for Arbitration was defective and improper, and further seeking (ii) a declaratory judgment declaring that AET wrongfully terminated and repudiated the agreement and that TCA had no further obligation to AET thereunder, and that TCA was entitled to recover from AET the sum of \$335,000, with interest, and other damages and relief. On October 2, 1970 TCA also obtained a temporary stay of the arbitration in an Order to Show Cause signed by Mr. Justice Paul A. Fino, Sr. of the Supreme Court, New York County, attached hereto as Exhibit H and made a part hereof.

15. On October 7, 1970, AET filed its answer to TCA's original petition herein, and on the same day the petition of TCA was heard before a Special Term, Part I, of the Supreme Court, New York County, Mr. Justice Manuel A. Gomez presiding. By stipulation before the Court by the attorneys for AET and TCA, the stay of arbitration was extended for one week.

16. On October 9, 1970, Mr. Justice Manuel A. Gomez signed an order granting TCA's motion to stay arbitration "on the ground that the demand for arbitration is defective and im-

Exhibit E
*Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment*

proper. It does not disclose the nature of the dispute. . . . In making this determination the court does not reach the question whether there exists a valid agreement 'to arbitrate the issues sought to be arbitrated.' The foregoing is without prejudice to the service of a proper demand." Said order is attached hereto as Exhibit I and made a part hereof.

17. On October 15, 1970, as previously alleged in paragraph 4 hereof, AET served a new Demand on TCA. The Demand, like the first Demand for Arbitration of September 23, 1970, was based on Section 13.7 of the Agreement, which provides as follows:

"13.7—Arbitration. *Except as herein provided to the contrary in Section 9.2*, any dispute concerning the validity, interpretation or application of this agreement, or any amendments thereto, or concerning any rights or obligation based on or in relation to such agreement and which cannot be resolved by the parties hereto, shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association." (Emphasis added.)

Said Section 9.2, a copy of which is attached hereto as Exhibit J and made a part hereof, provides in part that "If one or more events of default enumerated in Section 9.1 shall occur, and while such event of default shall be continuing, then and in any such event . . ." AET may take certain action and seek certain remedies as set forth in said Section. These remedies, some of which are unconscionable, include among other things, immediate repossession of the aircraft, and immediate collection of various rents and expenses. In addition, Section 9.2 states that AET may enforce its rights "by any action, suit or proceeding (in equity or at law). . . ."

18. Since Section 13.7 of the Agreement excepts from arbitration the matters referred to in Section 9.2, there was no agree-

Exhibit E
Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment

ment between the parties to arbitrate the issue of whether an event of default had occurred, or was continuing, so as to give rise to the remedies provided in Section 9.2 of the Agreement nor was there any agreement between the parties to arbitrate the validity and enforceability of such remedies.

II

19. Under Section 13.7 of the Agreement, arbitration of those matters to be arbitrated was to proceed "in accordance with the rules and regulations of the American Arbitration Association." Section 7 of the Commercial Arbitration Rules of the AAA provides in part that the Demand for Arbitration "shall contain a statement setting forth the nature of the dispute, the amount involved, if any, [and] the remedy sought. . . ."

20. AET's Demand, attached hereto as Exhibit A, is defective and improper in that it fails to state the complete nature of all disputes. The third issue is stated only as whether TCA was in default by "Failure and refusal to use its best efforts to promptly obtain all required registrations with and approval of governmental agencies", without specification or explanation of what registrations or approvals are referred to. The fourth issue is stated only as whether TCA was in default by "Failure and refusal to do and perform such other and further acts as required by law and reasonably requested by Aerlinite Eireann Teoranta to carry out and effect the intents and purposes of the Contract and the leases required to be executed thereunder", without any statement of what required acts TCA failed or refused to perform.

21. In addition, the Demand does not set forth the amount involved in the dispute, if any, and fails to specify the remedy sought since it seeks merely a declaration that TCA was in default under the terms of the Contract and that in terminating the Contract AET followed prescribed procedures, without specifying whether termination is the only remedy AET seeks or whether it seeks in addition damages or other relief.

Exhibit E to Item 3

Exhibit E
*Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment*

22. The Agreement specifically excludes from arbitration the issues of (i) whether a default has occurred or is continuing for purposes of Section 9.2 thereof, and (ii) the validity and enforceability of the remedies provided in Section 9.2. In short, there was no agreement between the parties that these issues should be arbitrated. Moreover, the Demand is defective in failing to state completely all issues of the dispute, the amount involved, if any, and the remedies sought. By reason of the foregoing, Petitioner requests that AET and the AAA be enjoined and stayed from proceeding with the arbitration pending the determination of this proceeding and that, after hearing, a permanent injunction and stay be entered.

23. No previous application has been made for the relief herein sought to this or any other Judge or Court.

DECLARATORY JUDGMENT

24. TCA repeats, as if fully set forth at length, the allegations contained in paragraphs 1 through 23 of this amended petition.

25. By reason of the foregoing AET wrongfully and in bad faith terminated and repudiated the Agreement.

26. A case and controversy exists between TCA and AET as to AET's rights to terminate and repudiate the Agreement and as to the rights of TCA as a consequence of said termination and repudiation.

27. By reason of AET's wrongful termination and repudiation of the Agreement, TCA is entitled to a declaratory judgment that it has no further obligation to AET under the Agreement and that it is entitled to recover from AET the advance payments referred to in paragraph 8 hereof, with interest, and to be compensated for such other damage as TCA may sustain as a result of AET's wrongful acts.

Exhibit E to Item 3

Exhibit E
*Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment*

WHEREFORE, petitioner TCA prays that an order be made staying the arbitration between the parties and all proceedings therein on the ground that no agreement to arbitrate the issues in dispute was made by the parties, and on the further ground that the Demand for Arbitration is defective and improper.

Petitioner TCA further prays that a declaratory judgment be entered by the Court declaring

(1) that AET wrongfully terminated and repudiated the Agreement and that TCA has no further obligation to AET thereunder, and

(2) that TCA is entitled to recover from AET the sum of \$335,000, with interest, made as advance payments under the Agreement, and such other damages as TCA may sustain as a result of AET's wrongful acts.

Petitioner TCA further prays for such other and different relief as to this Court may seem just and proper, together with the costs and disbursements of this proceeding.

Dated: New York, New York
October 22, 1970

DEBEVOISE, PLIMPTON, LYONS & GATES
320 Park Avenue
New York, New York
PLaza 2-6400
Attorneys for Trans Caribbean
Airways, Inc.

Of Counsel:
ROGERS & ROGERS
570 7th Avenue
New York, New York
736-3723

Exhibit E to Item 3

Exhibit E
Verified Amended Petition for Stay of Arbitration and
for Declaratory Judgment

Verification

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

IRVING M. BUCKLEY, being duly sworn, says that he is the Executive Vice President of Trans Caribbean Airways, Inc., the petitioner above named, that he has read and knows the contents of the foregoing amended petition to stay arbitration and for a declaratory judgment, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

The reason why this verification is made by deponent and not by Trans Caribbean Airways, Inc. is because petitioner is a corporation and deponent is one of its officers, to wit its Executive Vice President.

IRVING M. BUCKLEY
Irving M. Buckley

(Sworn to by Irving M. Buckley on October 22, 1970.)

Exhibit F

**SUPREME COURT
NEW YORK COUNTY
SPECIAL TERM—PART I**

[SAME TITLE]

LEFF, J.:

This is a motion to stay arbitration based upon lack of a valid agreement and a defective demand. The dispute between the parties arises under an agreement of February 8, 1969 which provides in essence for petitioner to lease from Aerlinite Eireann Teoranta (AET), with option to purchase, two Boeing 747 jet aircraft over a five-year period. AET terminated the agreement on September 2, 1970 on the ground that petitioner was in default thereunder. Petitioner denied it was in default. AET served notice of arbitration.

The dispute between the parties is whether or not petitioner was in default under the agreement.

Section 9.1 of the agreement specifies those acts of petitioner which constitute an "event of default". After specifying such "events of default", section 9 concludes with the following language:

"Then in the happening of any of the foregoing Events of Default AET shall have the remedies set forth in Section 9.2."

Section 9.2 of the agreement then goes on to provide for AET's remedies where there has been an "event of default".

The language of said Section 9.2 begins:

"If one or more events of default enumerated in Section 9.1 shall occur, and which such event of default shall be continuing, then in any such event:"

Exhibit F to Item 3

Exhibit F

The balance of Section 9.2 then specifies what these remedies are, among which is included the right to terminate the agreement.

After specifying these remedies, Section 9.2 then states, at pages 9 and 10 of the agreement:

"In addition AET may proceed to protect and enforce its rights by any action, suit or proceeding (in equity or in law) whether for specific performance of any covenants or agreement or in aid of the exercise of any power granted by this agreement."

The arbitration clause in Section 13.7 of the agreement reads:

"Except as herein provided to the contrary in Section 9.2, any dispute concerning the validity, interpretation or application of this agreement, or any amendments thereto, or concerning any rights or obligations based on or in relation to such agreement and which cannot be resolved by the parties hereto, shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association."

The arbitration is in the broadest form. Except for the one exclusion appearing therein, the arbitration was intended to cover all disputes between the parties, including which of them is in default.

Section 9.1 specifies these acts or admissions which constitute an "event of default". Section 9.2 is concerned solely with AET's remedies once an "event of default has occurred". Section 13.7 provides that all disputes under the agreement are subject to arbitration "except as therein provided to the contrary in Section 9.2".

The only matter which is not subject to arbitration under the agreement is the question of what remedies AET may pursue,

Exhibit F to Item 3

Exhibit F

AET being given the express rights under the agreement to exercise specified remedies in the event of default and, if necessary, to enforce same in a court of law. It is clear that disputes under Section 9.1 are not excluded from arbitration.

The points of the dispute in the demand for arbitration have been sufficiently expressed for arbitration. The argument advanced by petitioner that this is not a controversy where arbitration would determine completely the controversy is without merit.

The requirement under Section 14.8 of the Civil Practice Act that submissions of existing disputes must be of a nature "which may be the subject of an action" is dropped under CPLR 7501 "because there appears to be no justification for such a limitation. The phrase 'without regard to the justiciable character of the controversy' emphasizes this decision" (see 8 N. Y. Civ. Prac.: Weinstein, Korn & Miller, ¶7501.04; Digest of Legislative Studies and Reports appearing under CPLR 7501; McKinney's Consolidated Laws N. Y. Anno., p. 433).

In what amounts to a second cause of action, petitioner seeks a declaratory judgment "that AET wrongfully terminated and repudiated the agreement" and that by reason thereof, petitioner is under no obligation to AET thereunder and is entitled to certain damages thereunder.

This claim is covered by the arbitration clause and is for the arbitrator to determine.

In any event, the Court has no jurisdiction over AET with respect to that portion of the petition seeking declaratory judgment in the absence of proper process.

Accordingly, the application to stay arbitration is denied.

Settle order.

Dated: December 7, 1970.

JAMES J. LEFF,
J. S. C.

Exhibit G

Judgment

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the New York County Courthouse, 60 Centre Street, New York, New York, on the 15th day of December, 1970.

PRESENT: HON. JAMES J. LEFF, Justice.

[SAME TITLE]

Petitioner having moved for an order staying the arbitration between the parties and all proceedings therein on the grounds that no agreement to arbitrate the issues in dispute was made by the parties and that the demand for arbitration is defective and improper, and for a declaratory judgment declaring that respondent Aerlinte Eireann Teoranta wrongfully terminated and repudiated the agreement under which said respondent seeks arbitration, that petitioner has no further obligation to said respondent thereunder and that said petitioner is entitled to recover from said respondent the sum of \$335,000.00, with interest, made as advance payments under said agreement, and such other damages as petitioner may sustain as a result of said respondent's alleged wrongful acts, and for such other and different relief as to this Court may seem just and proper, together with the costs and disbursements of this proceeding; and

Upon reading and filing the order to show cause dated October 23, 1970 and the amended petition verified October 22, 1970, and the exhibits annexed thereto, and the Affidavit of Irving M. Buckley sworn to October 6, 1970, and the exhibit annexed thereto, in support of said motion, and the answer of respondent Aerlinte Eireann Teoranta verified November 9, 1970, and the exhibits annexed thereto, and the opposing affi-

Exhibit G to Item 3

A 93

Exhibit G

Judgment

davit of Leonard H. Steibel sworn to November 6, 1970, and the exhibits annexed thereto, in opposition to said motion, and due deliberation having been had, and the Court having rendered its written decision dated December 7, 1970;

Now on motion of Smith & Steibel, Esqs., attorneys for respondent Aerlinte Eireann Teoranta, it is

ORDERED and adjudged that said motion be and it hereby is in all respects denied.

Enter:

J. Jh
J. S. C.

NORMAN GOODMAN, CLERK

FILED
Dec 22 1970
County Clerk's Office
New York

Exhibit G to Item 3

Exhibit H

Order to Show Cause

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the New York County Courthouse, 60 Centre Street, New York, New York, on the 14th day of January, 1973.

PRESENT: HON. BIRDIE AMSTERDAM, Justice.

[SAME TITLE]

Upon reading and filing the annexed affidavit of Ludwig A. Saskor sworn to January 19, 1973 and the exhibit annexed thereto, it is

ORDERED, that petitioner show cause at a Special Term, Part I of this Court, to be held at the New York County Courthouse, 60 Centre Street, New York, New York, on January 24th, 1973, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered pursuant to Article 75 of the Civil Practice Law & Rules confirming the award of the arbitrators dated January 3, 1973 and granting respondent Aerlinte Eireann Teoranta such other, further and different relief as the Court may deem just and proper; and it is further

ORDERED, that sufficient reason appearing therefor, let service of a copy of this order and the papers upon which it is based upon Debevoise, Plimpton, Lyons & Gates, Esqs., attorneys for petitioner, on or before January 19, 1973, be deemed sufficient.

Enter:

/s/ BIRDIE AMSTERDAM

J. S. C.

Exhibit H to Item 3

Affidavit of Ludwig A. Saskor

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LUDWIG A. SASKOR, being duly sworn, deposes and says:

1. I am a member of the firm of Smith, Steibel & Alexander, attorneys for respondent Aerlinte Eireann Teoranta, commonly known as Irish International Airlines ("Irish"). I submit this affidavit in support of Irish's application for confirmation of an arbitration award dated January 3, 1973.

2. On February 8, 1968, petitioner and Irish entered into an agreement for the leasing of aircraft. A copy of said agreement has already been furnished to the Court in this proceeding.

3. Thereafter, a dispute arose under said agreement.

4. On October 15, 1970, in connection with said dispute, Irish instituted an arbitration proceeding against petitioner before the American Arbitration Association pursuant to an arbitration clause contained in said agreement.

5. On October 23, 1970, petitioner moved in this Court to stay said arbitration on the ground, *inter alia*, that no agreement was made to arbitrate the issues sought to be arbitrated.

6. By judgment entered December 16, 1970, this Court denied said motion.

7. Said judgment was affirmed on appeal.

8. Arbitrators were duly appointed in said arbitration proceeding.

Exhibit H to Item 3

Exhibit H
Affidavit of Ludwig A. Saskor

9. During the pendency of said arbitration proceeding, petitioner was merged into American Airlines, Inc. ("American").

10. Under the terms of said merger, American was the surviving company and succeeded to all of petitioner's rights and liabilities under said agreement.

11. Thereafter, hearings were held in said arbitration proceeding.

12. On January 3, 1973, the arbitrators issued their award in said arbitration proceeding. A copy of said award is annexed hereto.

13. Said award was delivered to Irish on January 17, 1973 and less than a year has elapsed since such delivery.

14. Throughout said arbitration proceeding petitioner was represented by the law firm of Debevoise, Plimpton, Lyons & Gates. On information and belief, said attorneys also represent American. We are therefore requesting permission to serve petitioner by serving said attorneys.

15. The reason this motion is being made by way of application for an order to show cause rather than notice of motion is that we are requesting the Court to designate the manner of service.

16. No previous application has been made for the relief requested herein.

WHEREFORE, it is respectfully requested that the arbitration award dated January 3, 1973 be confirmed, and that respondent Aerlinde Eireann Teoranta have such other, further and different relief as the Court may deem just and proper.

LUDWIG A. SASKOR
Ludwig A. Saskor

(Sworn to by Ludwig A. Saskor on January 19, 1973)

Exhibit H to Item 3

Exhibit I

**Affidavit in Opposition to a Motion to Confirm
Arbitration Award**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANDREW C. HARTZELL, JR., having been duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Debevoise, Plimpton, Lyons & Gates, attorneys for American Airlines, Inc. ("American"), successor in interest to Trans Caribbean Airways, Inc. ("TCA"). I make this affidavit in opposition to the motion, dated January 19, 1973, by Aerlinthe Eireann Teoranta ("AET") to confirm an arbitration award dated January 3, 1973.

STATEMENT OF FACTS

2. On February 8, 1968, AET and TCA entered into an agreement for the lease by TCA of two Boeing 747 aircraft for successive winter seasons. Total rentals called for by the agreement were approximately \$13 million. A copy of the entire agreement has previously been furnished to the Court in this proceeding, but for the convenience of the Court the pages of the agreement relevant to the instant motion are attached hereto as Exhibit A.

3. On September 2, 1970, AET terminated the agreement. AET's notice of termination, a copy of which is attached hereto as Exhibit B, asserted only two grounds for the termination: first, that TCA had failed to make an advance payment of \$85,000;

Exhibit I to Item 3

Exhibit I

*Affidavit in Opposition to a Motion to Confirm
Arbitration Award*

and second, that TCA had failed to execute the first seasonal lease within five days after AET demanded execution. TCA tendered the advance and executed lease immediately after AET's termination, but AET refused to accept either.

4. On October 15, 1970, AET served its Demand for Arbitration. The Demand, a copy of which is attached hereto as Exhibit C, requested that the arbitrators find that TCA was in default under the agreement and that AET "in terminating the term of the Contract . . . [had] followed the procedures prescribed under the Contract."

5. An arbitration proceeding was conducted, and on January 17, 1973 the arbitrators issued their award. A copy of the award is attached hereto as Exhibit D. The arbitrators found that "there was an event of default on the part" of TCA on three grounds. One of the grounds was TCA's "failure to use its best efforts to register the aircraft." The arbitrators also found that AET had "followed proper procedures in effectuation of cancellation.

THE INSTANT MOTION

6. American, as successor to TCA, respectfully submits that AET's motion should be denied and the award vacated on the ground that the arbitrators prejudiced TCA by issuing an award which, under CPLR 7511(b) (iii), "exceeded [their] power."

7. As the leading commentators on New York procedure have correctly observed, "it is well settled that arbitrators must act within the limits imposed" by the agreement which is the foundation of their authority. 8 Weinstein, Korn & Miller, *New York Civil Practice* ¶7511.18, at 75-170 (1965). Although an award may not be vacated merely because arbitrators commit an error of fact or law, vacatur is appropriate when the award "on its face and without express mention of the fact ignores

*Exhibit I**Affidavit in Opposition to a Motion to Confirm
Arbitration Award*

an express provision of the contract" *Matter of Granite Worsted Mills, Inc.*, 25 N. Y. 2d 451, 455 (1969). Thus, when arbitrators give "a completely irrational construction to the provisions in dispute and, in effect, [make] . . . a new contract for the parties," an award cannot be confirmed. *National Cash Register Co. v. Wilson*, 8 N. Y. 2d 377, 383 (1960). In at least two respects the arbitrators in this proceeding exceeded their authority by completely disregarding express provisions of the contract and the issues submitted to them, thereby making a new contract:

I. The arbitrators found that "an event of default" occurred, in part, because of TCA's failure to use its best efforts to register the aircraft and that AET "followed proper procedures in effectuation of cancellation." It is undisputed that Section 9.2A of the agreement expressly provided that

"If one or more events of default . . . shall occur, . . . AET may by notice to TCA specifying the event of default terminate the term of this Agreement. . . ." (Emphasis added.)

It is also undisputed that AET's notice of termination totally failed to specify any event of default relating to TCA's use of best efforts.* See attached Exhibit B. In concluding that AET had

* In addition, even the arbitrators' finding of an "event of default" on such a ground itself constitutes an impermissible revision of the agreement. Section 9.1 of the agreement provided that a "default" ripened into an "event of default" only after TCA had been afforded notice of the default and a grace period within which to cure it. Under Section 9.1(d) TCA's grace period to cure a default for failure to use best efforts was 15 days. It is undisputed, however, that AET gave TCA no such notice and no such grace period. As a consequence, even if such a "default" had existed, it could not have been a ground for an "event of default" justifying termination.

Exhibit I

*Affidavit in Opposition to a Motion to Confirm
Arbitration Award*

followed the proper procedures in terminating because of TCA's purported failure to use best efforts, the arbitrators "made a new contract for the parties" and failed to "act within the limits imposed" by the agreement. Their award is thus based upon a manifest disregard of the agreement and upon a ground which AET itself did not rely on in terminating. Such action was clearly beyond the arbitrators' power, and constitutes a major substantive abuse of authority which requires vacatur under CPLR 7511.

II. The arbitrators found that AET "followed proper procedure in effectuation of *cancellation*." (Emphasis added.) Section 9.2A, however, permitted AET only to "*terminate the term*" of the agreement (that is, the lease terms)—not to "cancel" the entire agreement. Indeed, the Demand for Arbitration itself permitted the arbitrators to do no more than to declare "that *in terminating the term* of the Contract" AET followed the correct procedures. The award is therefore contrary to the agreement, not in compliance with the Demand, and exceeds the scope of the issues submitted by the parties. Under these circumstances, as the courts have made clear, the award must be vacated. See, e.g., *Lovece v. Local 32B*, 37 Misc. 2d 709, 236 N. Y. S. 2d 91 (Sup. Ct. N. Y. Co. 1962).

WHEREFORE, American as successor to TCA asks that AET's motion to confirm be denied and that the arbitrators' award be vacated.

ANDREW C. HARTZELL, JR.
Andrew C. Hartzell, Jr.

(Sworn to by Andrew C. Hartzell, Jr., on January 26, 1974)

Exhibit J

**Letter dated July 17, 1970, from
Richard A. Lempert to Emil Rogers**

AMERICAN AIRLINES

633 Third Avenue, New York, New York 10017, TN 7-1234

Cable Address AMAIR

July 17, 1970

Emil Rogers, Esq.
Rogers & Rogers
570 7th Avenue
New York, New York

Dear Mr. Rogers:

At your request, Mr. Keusey has forwarded to me a letter dated June 16, 1970 from Aer Lingus to Trans Caribbean together with enclosures, and a copy of the Agreement between Trans Caribbean Airways, Inc. and Aerlinte Eireann Teoranta for the lease of Two Boeing Model 747-48 Aircraft dated February 8, 1968.

We have reviewed these documents and question whether the Federal Aviation Administration will accept these aircraft for registration under Part 47 of the Federal Aviation Regulations. The reasons for our concern may be briefly summarized as follows:

1. Section 47.3 of the Federal Aviation Regulations provides that an aircraft shall only be eligible for registration if it is owned by a citizen of the United States.
2. Section 47.5 of the Federal Aviation Regulations defines an owner as including "a lessee of an aircraft under a contract of conditional sale." Although the lease documents appear to be an attempt to qualify Trans Caribbean as such a lessee, we do not think that the option to purchase described in paragraph

Exhibit J to Item 3

Exhibit J

15 of the Aircraft Lease Agreement changes what is essentially a short-term seasonal lease into a conditional sale agreement.

3. We also question whether the purchase option granted by paragraph 15 of the Aircraft Lease Agreement will be considered bona fide inasmuch as it provides for an option price 15% above the market value of a new B747.

4. We are particularly concerned about the eligibility of these aircraft for registration in light of Section 47.43 of the Federal Aviation Regulations which provides that registration is invalid if:

"The applicant is a citizen of the United States, but his interest in the aircraft was created by a transaction that was not entered into in good faith and was made to avoid (with or without the owner's knowledge) compliance with section 501 of the Federal Aviation Act of 1958 (49 U. S. C. 1401), that prevents registration of an aircraft owned by a person who is not a citizen of the United States."

Since the first Aer Lingus B747 is scheduled for delivery in November, I think it is important that we meet with Aer Lingus' attorney to review the lease as soon as possible and I would appreciate it if you could arrange such a meeting.

Sincerely,

RICHARD A. LEMPert
Richard A. Lempert

cc: Edwin H. Keusey, Esq.

Exhibit J to Item 3

A 103

Exhibit K

In the Matter of the Arbitration

Between

AERLINTE EIREANN TEORANTA

and

TRANS CARIBBEAN AIRWAYS, INC.

1310-1038-70

**PRE-HEARING MEMORANDUM OF
TRANS CARIBBEAN AIRWAYS, INC.**

DEBEVOISE, PLIMPTON, LYONS & GATES

Attorneys for Respondent

Trans Caribbean Airways, Inc.

320 Park Avenue

New York, New York 10022

PLaza 2-6400

ANDREW C. HARTZELL, JR.

STANDISH F. MEDINA, JR.

ROBERT C. DINERSTEIN

Of Counsel

New York, New York

December 1, 1971

Exhibit K to Item 3

Exhibit K

II. AMERICAN'S APPLICATION TO THE FAA WAS PROPER.
IN ADDITION, TCA WAS NOT RESPONSIBLE FOR
AND DID NOT CONTROL AMERICAN.

Although AET cannot rely on an alleged default by TCA with respect to registration to justify the drastic act of termination, the registration issue is of some relevance since it explains AET's bad faith purpose in terminating.

The Agreement provided that if despite best efforts by TCA and for reasons beyond its control the aircraft could not be registered with the FAA, the Agreement would terminate without either party being liable to the other (except AET would be required to refund any advance payments). Registration was vital since TCA could not fly unregistered aircraft in United States air commerce. Federal law states that an aircraft can be registered only by its "owner", and that the owner must be a citizen of the United States. For purposes of applying this rule, a lessee under a contract of conditional sale is treated as an "owner" and is entitled to register the aircraft; similarly treated is a lessee with a bona fide option to purchase when the lease is equivalent to a contract of conditional sale.

The parties knew from the outset that registration was a problem since (i) AET, an Irish corporation, was to be the owner, and a foreigner cannot register the aircraft in the United States, (ii) TCA was to be a seasonal lessee, and (iii) it was never intended that TCA would purchase the aircraft under a conditional sales agreement.

AET and TCA sought to avoid the problem by providing in the Agreement and in each separate seasonal lease that TCA had an option to purchase. They hoped that when an individual seasonal lease was routinely presented for registration at the FAA, the lease might be registered without question on the mistaken assumption that since it contained an option to purchase it was equivalent to a conditional sales agreement. Actually

Exhibit K

the option price was set so high as to assure that the option would never be exercised.

When the Agreement was made in 1968, TCA was an independent airline. In January 1970, American and TCA announced plans to merge. Thereafter, while the merger was pending, American learned of the questionable strategy that would be required in order to register the AET aircraft in the United States. The matter was pointed out to AET. Realizing that American was not willing to engage in subterfuge,

* * *

(2) *Best Efforts*. Even if the registration issue were not "academic", TCA was not in default on September 2, 1970 when AET terminated. At that time, more than two months before delivery of the first aircraft, TCA could not have registered it under any circumstances.

TCA would have had to submit to the FAA the following documents to register the aircraft: (i) an affidavit from AET indicating that title had passed from Boeing to AET, (ii) AET's bill of sale, (iii) an ink-signed copy of the first seasonal lease, and (iv) two copies of the registration form. Except for the lease, these documents would not become available to TCA until *after* Boeing had delivered the aircraft to AET in November. Hence, any effort by TCA to register the plane without these documents would have been futile. By terminating the Agreement on September 2, AET prevented TCA from taking the steps necessary to register the aircraft.

II. AMERICAN'S APPLICATION TO THE FAA WAS PROPER.
IN ADDITION, TCA WAS NOT RESPONSIBLE FOR
AND DID NOT CONTROL AMERICAN.

As previously noted, federal law permits registration of an aircraft only if it is "owned" by a "citizen of the United States". The registration requirement reflects a long-standing and deeply embedded congressional policy barring foreign-owned aircraft from United States air commerce. A United States citizen who

Exhibit K

is purchasing an aircraft under a conditional sales contract qualifies as an "owner" for purposes of registration. Similarly, a lessee of an aircraft also qualifies as an "owner" for registration purposes if the lease is equivalent to a conditional sales contract.

Since the real owner of the AET aircraft would be an Irish corporation wholly owned by the Irish government, and since the seasonal leases were not equivalent to conditional sales contracts, AET and TCA recognized from the outset that registration was a problem. They therefore provided that the entire Agreement would terminate without either party being liable if despite best efforts registration could not be obtained.

Nevertheless, the Agreement was drafted in a form that might be used to obtain registration if the full facts of the transaction were concealed from the FAA:

- (1) The Agreement, as well as each seasonal lease, gave TCA an option to purchase the aircraft but at a price 15 percent above that of a new Boeing plane

* * *

merger was consummated, and the financial resources of American became available, TCA could not pay the rents and the Agreement for the planes would be ended. American advised AET that American was entitled under the merger agreement to abandon the merger in view of TCA's operating losses, and that the commitment for the AET aircraft (which American did not need and which represented TCA's largest obligation) could be a significant factor in American's decision whether to proceed with the merger.

American therefore proposed that the leasing arrangements be renegotiated and the lease periods shortened, and that efforts be made to resolve the registration problem which had been raised by American's counsel. AET rejected these proposals. Knowing that American had already invested substantial sums in TCA in advance of final approval of the merger, AET gambled that American would complete the merger. AET officials stated

Exhibit K to Item 3

Exhibit K

that they would "take their chances" both on consummation of the merger and on the registration issue.

On August 12, 1970, AET's New York attorneys wrote to TCA, stating "that our Washington counsel has advised us that the . . . leases would be fully registerable assuming . . . that best efforts are made to register the same. . . ." This opinion was reported to American. Confronted with conflicting legal opinions, American sought a formal opinion from Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick ("Crowe, Dunlevy"), an Oklahoma City law firm expert in aircraft registration matters. Crowe, Dunlevy answered American's inquiry on August 17. It concluded that the lease was not a contract of conditional sale and that the aircraft would not be eligible for United States registration in the name of TCA as lessee under the Agreement.

Upon receipt of this opinion from counsel, American decided to seek a ruling from the FAA. Incomplete disclosure might have invalidated any registration issued by the FAA, since section 47.43 of the Federal Aviation Regulations provides that a registration is invalid if the U. S. applicant's

" . . . interest in the aircraft was created by a transaction that was not entered into in good faith and was made to avoid (with or without the owner's knowledge) . . . compliance with section 501 of the Federal Aviation Act of 1958 (49 U. S. C. 1401), that prevents registration of an aircraft owned by a person who is not a citizen of the United States."

In addition, acquiescence in the submission of a false or dishonest answer on the registration form might have (a) subjected American to criminal sanction, (b) endangered insurance coverage of the aircraft, and (c) caused revoca-

* * *

responded on September 25 by flatly refusing to attend. Its letter, a copy of which is attached as Exhibit H, reiterated that the

Exhibit K to Item 3

Exhibit K

Agreement was terminated, and stated that "the question of the registerability of the lease is in our opinion academic."

On November 3, 1970, the FAA issued a formal opinion in which it stated that the aircraft were not registerable. A copy of that opinion is attached as Exhibit I.

The facts set forth above show that TCA in no way violated any obligation to use best efforts to register the aircraft. It was AET, first by its termination and thereafter by its refusal to go jointly with American and TCA to the FAA, that prevented a joint approach to resolve the registration issue. Nor were American's actions in any way improper. Because of the pending merger, American had a right, as well as a responsibility to its own stockholders, to scrutinize carefully any potential irregularity with respect to registration of the AET aircraft. As a third party protecting its own rights and business interests, American was entitled to seek advice from the FAA on registration. It made its position clear to AET from the outset, sought meetings to discuss the registration issue, and even tried to arrange a joint meeting with the

* * *

Consequently, American's application was made for *bona fide* business reasons and did not conflict with TCA's obligation to use best efforts to get FAA approval for the registration of the aircraft.

**III. TCA IS ENTITLED TO A REFUND
OF ITS ADVANCE PAYMENTS, WITH INTEREST**

Because AET wrongfully terminated the Agreement, TCA is entitled to a refund, with interest, of its advance payments of \$335,000.

In the alternative, TCA is entitled to the same relief, without interest, pursuant to Section 13.1 of the Agreement and paragraph (6) of Letter Agreement No. 1, since, as stated in the FAA opinion of November 1970, the foreign-owned aircraft could not lawfully be registered in the United States.

Exhibit K to Item 3

Exhibit K

* * *

CONCLUSION

For the foregoing reasons, TCA respectfully asks the Arbitrators to find that (a) TCA was not in default under the Agreement when AET terminated on September 2, 1970, and (b) TCA is entitled to a refund of its advance

* * *

Exhibit L

January 25, 1971

American Arbitration Association
140 West 51st Street
New York, New York 10020

ANSWERING STATEMENT OF TRANS CARIBBEAN AIRWAYS, INC.
("TCA") TO DEMAND FOR ARBITRATION DATED OCTOBER 15,
1970, OF AERLINTE EIREANN TEORANTA, INC. ("AET")
1310-1038-70

Gentlemen:

In accordance with the Order of the Appellate Division, First Department, staying the arbitration hearing herein pending appeal but not staying other pre-hearing procedures, and your letter dated January 19, 1971 advising us that you will proceed with further administration of the matter, TCA submits its Answering Statement to AET's Demand for Arbitration (the "Demand"). In doing so, TCA reasserts its position on the appeal now pending before the Appellate Division that (i) the arbitration clause in its 1968 Agreement with AET (the "Agreement") does not cover arbitration of the issues sought to be arbitrated in this proceeding, and (ii) the Demand is defective in failing to specify certain issues in dispute and the remedies sought. TCA does not waive that position by filing this Answering Statement. Subject to the foregoing, TCA answers the Demand as follows:

NATURE OF THE DISPUTE

1. Denies that it was in default under the Agreement on September 2, 1970 with respect to payment of the \$85,000 due July 1, 1969, since:

(a) AET waived its right to receive payment of said sum on the due date and extended TCA's time to pay by (i) granting to TCA various and indefinite extensions of time to make such payment, (ii) acquiescing in TCA's

Exhibit L to Item 3

Exhibit L

failure to pay, (iii) proceeding under the Agreement so as to lead TCA to believe that payment at a date to be specified in the future would be satisfactory, and (iv) not specifying any such future date for payment;

(b) upon receipt of AET's termination notice on September 2, 1970, which TCA treated as a new demand for payment, TCA immediately tendered the \$85,000 to AET, but AET rejected the payment.

2. Denies that it was in default on September 2, 1970 with respect to executing the lease tendered by AET for the first aircraft since:

(a) the time specified in the Agreement for execution of such lease had not expired when AET wrongfully terminated the Agreement on September 2, 1970. Under the Agreement TCA had until 60 days prior to the scheduled delivery date of the first aircraft to execute the lease. AET had notified TCA that the delivery date would be on or after November 9, 1970, and TCA therefore was not required to execute the lease until September 10, 1970;

(b) on September 4, 1970, within the period permitted by the Agreement, TCA executed the lease, but AET rejected said lease; and

(c) in the alternative, AET waived any right to demand that TCA execute the lease within five days after receipt of AET's demand for execution dated July 8, 1970, and extended TCA's time to execute the lease, by (i) acquiescing in TCA's failure to execute the lease within such five-day period, (ii) proceeding under the Agreement so as to lead TCA to believe that execution at a date to be specified in the future would be satisfactory, and (iii) not specifying any such future date.

3. Denies that it was in default on September 2, 1970 with respect to using its best efforts to obtain promptly all required registrations with and approvals of governmental agencies since:

Exhibit L to Item 3

Exhibit L

(a) TCA took all steps required under the Agreement, if any were required, prior to September 2, 1970 when AET wrongfully terminated the Agreement, thereby rendering futile any steps by TCA to obtain governmental registrations or approvals; and

(b) in addition, the Demand does not specify what registrations and approvals are referred to or what efforts were required, and TCA demands such specification prior to the hearing.

4. Denies that it was in default on September 2, 1970 with respect to doing or performing any other and further acts required by law and reasonably requested by AET to carry out the Agreement and the leases thereunder since:

(a) TCA performed all such acts required under the Agreement until September 2, 1970, when AET wrongfully terminated the Agreement, thereby rendering futile the performance by TCA of any other or further acts; and

(b) in addition, the Demand does not specify what other and further acts are referred to and TCA demands such specification prior to the hearing.

ADDITIONAL DEFENSES

5. AET is estopped from obtaining a declaration that TCA was in default for the reasons referred to in "1" and "2" above, and from relying on such events of default, since AET acted in bad faith in terminating the Agreement. The Agreement, and a Letter Agreement between the parties executed on the same date, provided that the Agreement and the obligations of the parties thereunder would terminate if the aircraft could not be registered in the United States and that, in such event, AET would refund to TCA all advance payments made by TCA prior to such termination. In the summer of 1970, American Airlines, Inc. ("American"), which had entered into a merger agreement with TCA by the terms of which American would succeed to TCA rights and obligations under the Agreement, applied to the

Exhibit L to Item 3

Exhibit L

Federal Aviation Administration for a determination as to whether the aircraft could be registered in the United States. AET, when it learned of such inquiry, concluded that the aircraft would not be registrable in the United States and that the Agreement would therefore terminate on the above stated terms in the fall of 1970 after the lease for that aircraft was executed and registration papers for that aircraft were submitted to the Federal Aviation Administration. Faced with this prospect, AET in bad faith terminated the Agreement on September 2, 1970, using as an excuse to cloak its real reasons the alleged technical defaults referred to in "1" and "2" above. In this proceeding AET seeks a declaration as to TCA's defaults in order to hold TCA responsible for damages under the Agreement on the premise that the aircraft could lawfully have been registered in the United States and the Agreement performed, even though the Federal Aviation Administration on November 2, 1970, two months after AET's bad faith termination, ruled that the aircraft could not be so registered.

6. AET is estopped from obtaining a declaration as to the alleged defaults referred to in "3" and "4" above, and from relying on such events of default, because it terminated the Agreement in bad faith and thereafter arbitrarily refused to join with TCA to obtain a ruling on registration of the aircraft. In addition, AET is barred from asserting these events of default since its termination notice failed to specify such events as required by Section 9.2 A of the Agreement.

7. AET's claims as to defaults are moot since regardless of whether such defaults occurred TCA's obligations under the Agreement and the Agreement itself would have been terminated because the aircraft were not lawfully registrable in the United States.

AET'S CLAIM FOR RELIEF

8. For the reasons stated above AET is not entitled to a declaration that TCA was in default under the Agreement. In-

Exhibit L

stead, TCA is entitled to a declaration that AET in bad faith terminated the Agreement and that in any event TCA has no further obligations under the Agreement since the aircraft could not lawfully have been registered in the United States.

9. For the reasons stated above AET is not entitled to a declaration that it followed prescribed procedures in terminating the Agreement. In addition, AET's termination notice failed to specify defaults "3" and "4" referred to above and such specification was a prescribed procedure under Section 9.2 A of the Agreement.

TCA'S COUNTERCLAIM FOR RELIEF

10. By reason of AET's conduct as described above, TCA is entitled to a declaration that the Agreement is terminated, that it has no further obligations thereunder, and that it is entitled to a refund of advance payments previously made plus interest, together with such other and further relief as may be appropriate. In the alternative, TCA is entitled to such a declaration because the aircraft were not lawfully registrable in the United States.

Very truly yours,

DEBEVOISE, PLIMPTON, LYONS & GATES
Attorneys for Trans Caribbean
Airways, Inc.
320 Park Avenue
New York, New York

Of Counsel:

ROGERS & ROGERS
570 Seventh Avenue
New York, New York

cc: SMITH & STEIBEL
Attorneys for Aerlinte
Eireann Teoranta

Exhibit L to Item 3

Exhibit M

In the Matter of the Arbitration
Between

AERLINTE EIREANN TEORANTA

and

TRANS CARIBBEAN AIRWAYS, INC.

1310-1038-70

POST-HEARING MEMORANDUM OF
TRANS CARIBBEAN AIRWAYS, INC.

DEBEVOISE, PLIMPTON, LYONS & GATES
Attorneys for Respondent
Trans Caribbean Airways, Inc.
320 Park Avenue
New York, New York 10022
752-6400

ANDREW C. HARTZELL, JR.
STANDISH F. MEDINA, JR.
ROBERT C. DINERSTEIN
Of Counsel

New York, New York
September 29, 1972

* * *

(Gaddis testified that in his opinion it would have been "irresponsible" for American not to have done so (Gad. 4578), and both Wallace (W 3749-50) and Harlan (H 2698) said that, under the circumstances, it was the proper course of action.) What Overbeck and Lempert could not have anticipated was

Exhibit M to Item 3

Exhibit M

AET's almost irrational response of terminating the entire Agreement, refusing any further comment to the FAA, and thus preventing any joint consideration of the issue.

(3) *The Statute and Regulations.* The registration requirement is found in Section 501 of the Federal Aviation Act, 49 U. S. C. § 1401 (Ex. 46), which makes it unlawful to operate an aircraft in the United States unless it is registered by the owner, and the owner must be a United States citizen. Under Section 47.5(c) of the Regulations (Ex. 47), the term "owner" is defined to include a lessee of an aircraft under a contract of conditional sale.

A basic part of the legislative policy behind the registration requirement is known as the principle of "cabotage" (L 2784-89) (Gad. 4507-08). It originated in maritime law and, simply stated, is that foreign-owned aircraft cannot fly between "capes" or points in the same country. The same principle underlies Section 1108 of the Federal Aviation Act, 15 U. S. C. § 1508, which was discussed in the letter from Eastern's counsel referred to in the footnote on p. 31, *supra*. See *Petition of Qantas*, 29 Civil Aeronautics Board Reports 33 (1959); Kingsley, *Nationality of Aircraft*, 3 Journal of Air Law and Commerce 50, 51 (1932); Convention on International Civil Aviation (Chicago Convention), December 7, 1944, Art. 7, 61 Stat. 1182;* *cf.* *Central Vermont Transportation Co. v. Durning*,

* Article 7 of the Chicago Convention specifically relates to "cabotage" and provides, in part, that "each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory." More than 120 nations, including Ireland and the United States, have signed the Convention.

Murdoch, after much dodging (M 5496-508), conceded that he had known the principle for at least ten years (M 5508-09). Gleeson also knew the principle (Gl. 196). So did O'Sullivan (O'S. 384). So, we believe, did Dargan (Ex. 2) (Gl. 201). In short, AET officials, as might be expected of an international airline, were well aware of the fundamental problem.

Exhibit M

294 U. S. 33, 41 (1935) ("long established national policy to restrict . . . foreign control of coastwise shipping"); *Marine Carriers Corp. v. Fowler*, 429 F. 2d 702 (2d Cir. 1970) ("Like all maritime nations . . . the United States treats its coastwise shipping trade as a jealously guarded preserve.").

The TCA-AET lease arrangement ran directly contrary to the cabotage principle, since an aircraft owned by a foreigner, AET, would have been flying on TCA's U. S. cabotage routes. By this method AET, a foreign carrier, would have been using domestic commerce (through receipt of rent from TCA) to finance the purchase of its aircraft (L 2786-88, 2872-73). Indeed, the rental to be paid by TCA was based directly on the payments of AET's depreciation and capital charges for the aircraft (Gl. 37-38, 176-77) (M 922-23) (Ex. B1).

The un rebutted testimony of Gaddis, as well as the FAA opinion (Ex. 48), demonstrate that TCA could not lawfully register the aircraft because it was not purchasing them under a conditional sales contract. The payments (that is, rentals) which TCA was obligated to make were not "substantially equivalent" to the value of the aircraft (that is, the rentals plus the option price) (Gad. 4487-93). The option price was not nominal, as required by the Act and common law (Gad. 4491, 5177), but was 115% of the cost of a new and different aircraft.

In addition, the Agreement was not a financing transaction intended to achieve the purchase of a chattel (LJ 1701-03) (Gad. 4496); the rental payments were not credited towards the purchase price but instead were added to the total cost the lessee would be required to pay in order to purchase the plane (L 2864-66) (LJ 1704); the value of the plane to be purchased was determined not on

* * *

demonstrate that the aircraft could be registered. TCA, with American's help, was prepared to take the aircraft if there was any way in which it could lawfully be registered.

Exhibit M to Item 3

Exhibit M

D. AET's virtually conceded purpose in terminating was and is to obtain from TCA, as damages under the Agreement, the rents it could not lawfully have obtained under the lease because the aircraft could not be registered in the United States. AET seeks a ruling in this arbitration that the termination was authorized, in order to use that ruling in court as a basis for claiming damages. Such a ruling for AET cannot possibly be justified. Furthermore, the result AET seeks would violate the registration and cabotage principles, since AET would be obtaining indirectly as damages what it could never have lawfully obtained as rent.

IV. TCA IS ALSO ENTITLED TO A REFUND
OF ITS ADVANCE PAYMENTS, WITH INTEREST.

Because AET wrongfully terminated the Agreement, TCA is entitled to a refund, with interest, of its advance payments of \$335,000. See *Boyce v. Barrett*, 258 F. 2d 640 (3d Cir. 1958).

In the alternative, TCA is entitled to the same relief, without interest, pursuant to section 13.1 of the Agreement and paragraph (6) of Letter Agreement No. 1, since, as stated in the FAA opinion of November 1970 (Ex. 48), the foreign-owned aircraft could not lawfully be registered in the United States.

* * *

Exhibit N

**AMERICAN ARBITRATION ASSOCIATION, Administrator
COMMERCIAL ARBITRATION TRIBUNAL**

**In the Matter of the Arbitration
between**

**AERLINTE EIREANN TEORANTA
and**

TRANS CARIBBEAN AIRWAYS, INC.

Case Number: 1310 1038 70

CLAIMANT'S BRIEF

**SMITH, STEIBEL & ALEXANDER
460 Park Avenue
New York, N. Y. 10022**

* * *

(Tr. 4571).^{*} By this time the Agreement had been terminated and TCA's belated tender of performance refused (Exs. GG, II). American and TCA could not be concerned about whether they would have to take the aircraft in November. On the other hand, the CAB decision on the merger was expected any day. Once there was a decision approving the merger, American's withdrawal from the merger, while legally permissible, would obviously be embarrassing. As part of its strategy, therefore, it was important for American to secure the FAA decision as soon as possible.

^{*} Any argument that American wanted the decision for the pending arbitration would not explain the urgency of American's inquiries. The first demand for arbitration was not served until September 23, and the second demand was not served until October 15. In both cases, TCA quickly moved for a court stay and secured a temporary stay in connection therewith. The final order denying a permanent stay was followed by an appeal and a further interim stay in connection with the appeal.

Exhibit N to Item 3

Exhibit N

IV. *The Aircraft Were Registrable.*

A. *FAA Practice.*

Mr. Gaddis' opinion of August 17, 1970 contains the following statement (Ex. 10, Gaddis op. pp. 5-6);

"The Administrator has, as a matter of practice, generally treated all leases containing options to purchase as conditional sales contracts where they are filed with the Administrator without any prior or accompanying request that a formal determination be made as to their legal effect."

As stated by the Chief of the FAA Aircraft Registry in 1962, "this Agency (*and its predecessor*) has for years marked the vendee under any such contract as the 'owner' of the pertinent aircraft[]" (Ex. BH Robinson 11/6/62 letter, p. 1, emphasis supplied). This practice was still in effect in 1970, when Irish terminated the Agreement (Tr. 4661-62, 4853). Under these circumstances, this FAA practice is entitled to great weight in interpreting the statute. *United States v. Alabama R. R. Co.*, 142 U. S. 615, 621, 12 Sup. Ct. 306, 35 L. Ed. 1134; *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 53 Sup. Ct. 350, 77 L. Ed 796. The rule is well stated in the latter case:

"True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. * * * The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." 288 U. S. at 315.

Exhibit N to Item 3

Exhibit N

Mr. Gaddis, aware of the foregoing principle, attempted to show that regardless of actual FAA practice, the FAA "policy" changed in 1967 (Tr. 4659-60). However, the documents reflecting this supposed change in FAA policy indicate that it was nothing more than an *ad hoc* decision to permit a lessor to register an aircraft under a lease containing a fair market value option exercisable only at the end of the lease term (Ex. AZ). These documents reveal: (1) that the FAA officials who made this decision felt that the lease was a conditional sale within the meaning of the Act; (2) that their decision was permissive rather than mandatory; and (3) that one of the primary factors which influenced them in permitting registration in the name of the lessor was that unless they gave such permission, the entire transaction would probably collapse. In that connection, it was noted that "The Administrator is required to promote the interest of civil aviation and action on the Agency's part that would cause this entire transaction to collapse would not be in the interest of civil aviation" (Ex. AZ, p. 4).

That the 1967 decision was permissive rather than mandatory is illustrated by a subsequent transaction of the same nature in which Mr. Gaddis' firm represented one of the parties and in which the FAA accepted registration in the name of the lessee (Exs. BE, BF, BG; Tr. 4900, 5124-25). Moreover, Mr. Gaddis' contention that the 1967 decision effected a change in FAA policy was based solely on his own opinion that it would be "inconsistent" for the FAA to permit registration by the lessor in the case of fair market value options exercisable at the end of the lease term but to accept registration in the name of the lessee in the case of the Irish—TCA leases (Ex. 10, Gaddis op. p. 6; Tr. 4789-91).

Mr. Gaddis' final argument was that in any case where the option price is more than a nominal sum the lease cannot qualify as a "conditional sales contract" within the meaning of the Act, regardless of the amount of rental and regardless of the other lease terms (Tr. 4491-92, 5177). It suffices to note: (1) that this theory is inconsistent with the definition of conditional sale

Exhibit N

contained in the Act; (2) that it is contrary to FAA interpretation (Exs. BH, AZ); and (3) that under this theory the Irish aircraft would not be registrable even if the option price were only fifty percent of the actual value of the aircraft.

B. Section 47.43(a)(4) of the FAA Regulations is Not Applicable.

TCA has submitted no evidence in support of its contention that the Irish—TCA Agreement violates Section 47.43(a)(4) of the FAA regulations. There was a genuine option (Tr. 1319, 1535). There were no additional agreements, "side letters" or understandings that the option would not be exercised (Tr. 349, 1434-35). This obviously is not the type of transaction contemplated by Section 47.43(a)(4).

C. The FAA Opinion of November 3, 1970 is Not Controlling.

The only possible ground on which TCA might reasonably seek to rest its registrability argument is the FAA opinion of November 3, 1970 (Ex. 48). For the reasons set forth below, any reliance on that opinion is misplaced:

(1) The opinion is based upon a one-sided, distorted presentation of the facts (Ex. 10).

(2) The request for the opinion was accompanied by a brief and an oral argument against registration (Ex. 10; Tr. 4398-4400, 4819-20).

(3) The fact that FAA Center Counsel in Oklahoma City and the FAA General Counsel's office in Washington—both interpreting the same statute and same regulations—came up with two opposite opinions illustrates that the law on registration is not black and white. Indeed it confirms that there is no law on registration. Mr. Gaddis admitted that he found no legislative history or cases interpreting the term "conditional sale" under the Act (Tr. 4649).

Supplemental Affidavit of Ludwig A. Saskor

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 309 Judge Wyatt

AMERICAN AIRLINES, INC.,

Plaintiff,

against

AERL.NTE EIREANN TEORANTA,

Defendant.

STATE OF NEW YORK }
COUNTY OF NEW YORK }

LUDWIG A. SASKOR, being duly sworn, deposes and says:

1. I am a member of the firm of Smith, Steibel & Alexander, attorneys for defendant. My moving affidavit of February 6, 1973 was submitted in support of defendant's motion under Rule 12 of the Federal Rules of Civil Procedure to dismiss the complaint.

2. On February 22, 1973, the day prior to the return date of defendant's motion to dismiss the complaint, we were served with an amended complaint. A copy thereof is annexed hereto as Exhibit A. For purposes of comparison, a copy of the Original complaint is annexed hereto as Exhibit B.

3. Although the Amended complaint purports to allege several additional causes of action, all of the causes of action in both pleadings arise out of the same set of facts and seek as the ultimate result to prevent defendant from enforcing an arbitration award dated January 3, 1973 (as to which defendant's application to confirm and plaintiff's application to vacate are presently

Item 4

Supplemental Affidavit of Ludwig A. Saskor

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 309 Judge Wyatt

AMERICAN AIRLINES, INC.,

Plaintiff,

against

AERLINTE EIREANN TEORANTA,

Defendant.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LUDWIG A. SASKOR, being duly sworn, deposes and says:

1. I am a member of the firm of Smith, Steibel & Alexander, attorneys for defendant. My moving affidavit of February 6, 1973 was submitted in support of defendant's motion under Rule 12 of the Federal Rules of Civil Procedure to dismiss the complaint.

2. On February 22, 1973, the day prior to the return date of defendant's motion to dismiss the complaint, we were served with an amended complaint. A copy thereof is annexed hereto as Exhibit A. For purposes of comparison, a copy of the Original complaint is annexed hereto as Exhibit B.

3. Although the Amended complaint purports to allege several additional causes of action, all of the causes of action in both pleadings arise out of the same set of facts and seek as the ultimate result to prevent defendant from enforcing an arbitration award dated January 3, 1973 (as to which defendant's application to confirm and plaintiff's application to vacate are presently

Item 4

Supplemental Affidavit of Ludwig A. Saskor

under consideration by the New York Supreme Court). All of the grounds of defendant's motion to dismiss the Original complaint are equally applicable to the Amended complaint. Defendant therefore requests that its motion to dismiss the Original complaint be deemed to apply to the Amended complaint, and that this supplemental affidavit be considered in connection therewith.

4. This affidavit will deal with the Amended complaint by reference to the various causes of action, in numerical order.

FIRST CAUSE OF ACTION

5. The factual allegations underlying the first cause of action in both the Original complaint and Amended complaint are substantially the same. The main difference is in the conclusory allegations: paragraph "13" of the Original complaint alleges that "enforcement of the arbitrators' award" would be in violation of the Federal Aviation Act and permit defendant to benefit from a contract the performance of which would have been unlawful and contrary to public policy, whereas the Amended complaint alleges in paragraph "16" that because of provisions of the Federal Aviation Act and public policy considerations defendant "was not and is not lawfully entitled to receive rentals or other payments from or relating to the use of its aircraft in United States air commerce, or to be awarded such rentals or other payments, or damages with respect thereto."

6. The phrasing of the foregoing conclusory language in the Amended complaint appears to have been borrowed from the prayer for relief in the Original complaint, which in pertinent part asked this Court to declare "that AET may not recover any damages or rentals from American or TCA as a result of any default by TCA under the Agreement"

7. Thus the first cause of action in both complaints is essentially the same, and no additional comments need to be made herein.

Item 4

Supplemental Affidavit of Ludwig A. Saskor

8. In paragraphs "5" and "10" of the Amended complaint, plaintiff incorporates by reference two of the three exhibits which formed part of the Original complaint. However, paragraph "14" of the Amended complaint, which refers to the FAA opinion of November 3, 1970 in language identical to that found in paragraph "11" of the Original complaint, fails to incorporate by reference the copy of the FAA opinion which was annexed as the third and last exhibit to the Original complaint. So as to cure this apparent oversight, a copy of the FAA opinion is annexed hereto as Exhibit C.

SECOND CAUSE OF ACTION

9. The second cause of action is based on an allegation which was made in paragraph "7" of the Original complaint in abbreviated form, although the Original complaint did not set up that allegation as a separate cause of action. Thus all of the grounds for dismissing the Original complaint are equally applicable to the second cause of action of the Amended complaint. In addition, the following additional grounds exist for dismissing the second cause of action of the Amended complaint:

(a) Paragraph "18" of the Amended complaint alleges (incorrectly) that under the agreement "if, *notwithstanding the best efforts of AET and TCA*, the aircraft may not lawfully be registered with the FAA, the Agreement shall be of no further force and effect." Thus under plaintiff's own version of the agreement, a condition of termination on this ground was that TCA and defendant use their best efforts to register the aircraft. There is no allegation that such best efforts were used, or that inability to register the aircraft was "*notwithstanding*" any such best efforts. The second cause of action therefore fails to state a claim on which relief can be granted.

(b) A copy of the agreement is attached to the Original complaint and incorporated by reference in the Amended complaint. Section 6 of Letter Agreement No. 1 (which is on the next to last page of Exhibit A of the Original complaint) does not

Supplemental Affidavit of Ludwig A. Saskor

say what paragraph "18" of the Amended complaint alleges it says. However, the provisions concerning termination on account of inability to register the aircraft are contained in Exhibit A to the Original complaint and therefore may be considered as having been correctly alleged in the Amended complaint, which incorporates that exhibit by reference. An examination of these provisions again establishes that the second cause of action fails to state a claim on which relief can be granted:

(i) Exhibit A to the Original complaint consists of three documents: (1) the basic agreement, which provides in effect that the parties will enter into aircraft leases; (2) the aircraft lease form, which the parties have agreed will be the form of the leases they will enter into; and (3) Letter Agreement No. 1, which is in effect a supplement to the basic agreement. Section 19.2 of the lease form provides in pertinent part that "If notwithstanding TCA's best efforts and for reasons beyond its control," TCA "is unable to effect registration of the Aircraft" and

"as a result of any of the foregoing (provided that any such inability has not resulted from TCA's breach of its obligations under this Lease), the Aircraft is grounded and the time during which the Aircraft cannot be operated by TCA continues for a period of more than 10 days and AET has reasonably estimated, after consultation with TCA, that TCA will not be able to cure such condition within 30 days from the date that such inability commenced, AET shall have the right to have the Aircraft redelivered to it within 2 days after serving written notice thereof on TCA whereupon this Lease shall terminate and TCA shall have no further liability hereunder. In the event that AET does not exercise its right to have the Aircraft redelivered and such inability continues for a period of 30 days, this Lease shall automatically terminate and neither party shall have any further liability to the other hereunder. * * *

Item 4

Supplemental Affidavit of Ludwig A. Saskor

(ii) Section 6 of Letter Agreement No. 1 provides in pertinent part:

"* * * If any of the events stipulated in Section 19.2 of Exhibit 1 of the Agreement occur and as a result of which the lease for the Initial Period is cancelled and, if AET and TCA, notwithstanding their best efforts, are unable to cure the relevant condition, the Agreement shall terminate under the conditions provided for in Section 13.1 of the Agreement."

(iii) Thus, reading Section 19.2 of the lease form and Section 6 of Letter Agreement No. 1 together, a number of conditions must be met before the agreement "comes to an end" on account of TCA's inability to register the aircraft: (1) TCA must actually attempt to register the aircraft, and fail in that attempt; (2) TCA's inability to register the aircraft must be "notwithstanding TCA's best efforts"; and (3) TCA's inability to register the aircraft must be "for reasons beyond its control"; and (4) TCA's inability to register the aircraft must not have resulted from TCA's breach of its obligations under the lease; and (5) the aircraft must be "grounded" as a result of such inability to register it; and (6) the inability to register the aircraft must continue for a period of thirty days; and (7) TCA and defendant must exercise their best efforts to cure the defect which prevented TCA from registering the aircraft, and be unable to do so; and (8) such inability to register the aircraft must result in cancellation of the lease for the Initial Period.

(iv) The Amended complaint fails to allege that all of the foregoing conditions obtained. It fails to allege that any of these conditions obtained. Indeed from the allegations of the Amended complaint it affirmatively appears that these conditions did *not* obtain. The second cause of action simply does not state a claim for relieving TCA of its obligations pursuant to these contractual provisions.

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(c) Finally, one of the foregoing conditions was litigated in the arbitration and there determined adversely to plaintiff. That condition is TCA's exercise of best efforts. One of the issues submitted to the arbitrators under defendant's demand for arbitration (Moving Affid. Ex. D) was whether TCA was in default under the agreement in:

"3. Failure and refusal to use its best efforts to promptly obtain all required registrations with and approvals of governmental agencies;"

On this issue, the arbitrators found in their award:

*1—There was an event of default on the part of TRANS CARIBBEAN AIRWAYS, INC., hereinafter referred to as RESPONDENT, as of September 2, 1970 (the date of termination by AERLINTE EIREANN TEORANTA, hereinafter referred to as CLAIMANT) on the grounds of:

* * *

"c) RESPONDENT's failure to use its best efforts to register the Aircraft;"

The foregoing determination that TCA did not use best efforts is *res judicata*, and plaintiff cannot seek a contrary determination in this Court.

THIRD CAUSE OF ACTION

10. Paragraph "21" of the Amended complaint is the same as paragraph "16" of the Original complaint. In the Original complaint this allegation was part of the second cause of action, which alleged that defendant suffered no damages because of TCA's defaults since performance of the agreement "became impossible" on November 3, 1970, the date of the FAA opinion, and thus was still impossible one week later on November 9 when rentals under the agreement would have commenced.

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Essentially the same allegation is found in paragraph "22" of the Amended complaint, which alleges in pertinent part that "at all times prior to and after November 9, 1970 registration of the AET aircraft in the name of TCA could not be lawfully effected and was legally impossible."

11. Basically, the only difference between the third cause of action in the Amended complaint and the second cause of action in the Original complaint is that plaintiff has rephrased the conclusory allegations. In the Original complaint plaintiff alleged that due to the foregoing alleged facts, defendant "suffered no damages." In the Amended complaint plaintiff alleges that due to the same alleged facts, there was "a failure of a basic condition of the agreement." If any cause of action is alleged, it is the same cause of action in both cases.

12. To the extent that the third cause of action of the Amended complaint may be different from the second cause of action of the Original complaint, it is nothing more than a restatement of the second cause of action of the Amended complaint. The observations herein with respect to the latter cause of action apply with equal force to the third cause of action.

FOURTH CAUSE OF ACTION

13. The fourth cause of action alleges that because TCA's defaults were neither material nor substantial and because TCA immediately offered to remedy these defaults, defendant's termination of the agreement was "improper." As a foundation for those allegations, the fourth cause of action alleges in paragraphs "25" and "26" that the issue of whether or not defendant was entitled to terminate was expressly excluded under the arbitration clause of the agreement and was not submitted to the arbitrators for determination, and that the arbitrators made no finding or determination as to whether defendant was entitled to terminate the agreement. The unstated conclusion which plaintiff draws from these allegations is that plaintiff is free to submit to this

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Court the question of whether defendant had the right to terminate the agreement.

14. The foregoing allegations are a combination, in reverse order, of (a) arguments previously made to the New York Supreme Court on TCA's motion to stay arbitration, and (b) arguments previously made to the arbitrators.

15. In paragraphs "17", "18" and "22" of its amended petition for a stay of arbitration and declaratory judgment (Moving Affid. Ex. E), TCA alleged:

"* * * Section 9.2, a copy of which is attached hereto as Exhibit J and made a part hereof, provides in part that 'If one or more events of default enumerated in Section 9.1 shall occur, and while such event of default shall be continuing, then and in any such event . . .' AET may take certain action and seek certain remedies as set forth in said Section. These remedies, some of which are unconscionable, include among other things, immediate repossession of the aircraft, and immediate collection of various rents and expenses. In addition, Section 9.2 states that AET may enforce its rights 'by any action, suit or proceeding (in equity or at law)'

"18. Since Section 13.7 of the Agreement excepts from arbitration the matters referred to in Section 9.2, there was no agreement between the parties to arbitrate the issue of whether an event of default had occurred, or was continuing, so as to give rise to the remedies provided in Section 9.2 of the Agreement nor was there any agreement between the parties to arbitrate the validity and enforceability of such remedies.

* * *

"22. The Agreement specifically excludes from arbitration the issues of (i) whether a default has occurred or is continuing for purposes of Section 9.2 thereof, and

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(ii) the validity and enforceability of the remedies provided in Section 9.2. * * *

16. A copy of the affidavit which defendant submitted in opposition to TCA's amended petition (excluding exhibits) is annexed hereto as Exhibit D. In paragraphs "6", "9" and "10" of its opposing affidavit, defendant pointed out that the reason its remedies were not subject to arbitration is that once there was a finding of default, defendant's remedies followed automatically under the agreement and were spelled out by the agreement; and therefore no dispute could arise as to defendant's remedies. Defendant's argument was accepted by the New York Supreme Court, which stated in its decision (Moving Affid. Ex. H, p. 3):

"The only matter which is not subject to arbitration under the agreement is the question of what remedies AET may pursue, *AET being given the express rights under the agreement to exercise specified remedies in the event of default* and, if necessary, to enforce same in a court of law." (Emphasis supplied)

17. Thus the clear ruling, by which plaintiff is now bound, is that once there has been a finding of TCA's default, TCA may not question defendant's right to pursue the remedies which are provided for in the agreement in the event of such default.

18. The further allegations in paragraphs "25" and "26" of the Amended complaint that the issue of whether or not defendant was entitled to terminate "was not submitted" to the arbitrators for determination and that the arbitrators did not determine this issue, are contradicted by TCA's Answering Statement and Counterclaim in the arbitration and in its opening and closing briefs. The claim that defendant's termination of the agreement was "improper" was squarely presented to the arbitrators as a complete defense to defendant's claim and in support of TCA's counterclaim in the arbitration. Thus TCA alleged in its Answering Statement (Moving Affid. Ex. L):

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"1. Denies that it was in default under the Agreement on September 2, 1970 with respect to payment of the \$85,000 due July 1, 1969, since:

* * *

"(b) upon receipt of AET's termination notice on September 2, 1970, which TCA treated as a new demand for payment, TCA immediately tendered the \$85,000 to AET, but AET rejected the payment.

"2. Denies that it was in default on September 2, 1970 with respect to executing the lease tendered by AET for the first aircraft since:

* * *

"(b) on September 4, 1970, within the period permitted by the Agreement, TCA executed the lease, but AET rejected said lease; and

* * *

"Additional Defenses

"5. AET is estopped from obtaining a declaration that TCA was in default for the reasons referred to in '1' and '2' above, and from relying on such events of default, since AET acted in bad faith in terminating the Agreement. * * * AET in bad faith terminated the Agreement on September 2, 1970, using as an excuse to cloak its real reasons the alleged technical defaults referred to in '1' and '2' above. * * *

"6. AET is estopped from obtaining a declaration as to the alleged defaults referred to in '3' and '4' above, and from relying on such events of default, because it terminated the Agreement in bad faith * * *

"AET's Claim for Relief

"8. * * * TCA is entitled to a declaration that AET in bad faith terminated the Agreement * * *

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"TCA's Counterclaim for Relief

"10. By reason of AET's conduct as described above, TCA is entitled to a declaration that the Agreement is terminated, that it has no further obligations thereunder,
* * *

19. The arbitration award found that TCA was in default and that defendant followed the proper procedures in terminating the agreement. In addition, it dismissed TCA's counterclaim, and held that the award was "in full settlement of all claims and counterclaims submitted to this Arbitration." Thus the foregoing contentions of TCA were rejected by the arbitrators, and that determination is *res judicata*.

20. Prior to submitting these issues to arbitration, TCA had attempted to raise the same issues in the New York Supreme Court. In that part of its amended petition which sought a declaratory judgment, petitioner alleged in pertinent part (Moving Affid. Ex. E, paras. 25-26):

"25. By reason of the foregoing AET wrongfully and in bad faith terminated and repudiated the Agreement.

"26. A case and controversy exists between TCA and AET as to AET's rights to terminate and repudiate the Agreement and as to the rights of TCA as a consequence of said termination and repudiation."

21. The New York Supreme Court held that these issues were covered by the arbitration clause in the agreement and should be submitted to the arbitrators. The Court stated (Moving Affid. Ex. F, p. 3):

"In what amounts to a second cause of action, petitioner seeks a declaratory judgment 'that AET wrongfully terminated and repudiated the agreement' and that by reason thereof, petitioner is under no obligation to AET thereunder, and is entitled to certain damages thereunder.

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"This claim is covered by the arbitration clause and is for the arbitrator to determine."

22. TCA's subsequent submission of these issues to the arbitrators was in accordance with the foregoing decision.

23. The fourth cause of action therefore must fail for three reasons: (a) it has already been determined by another court that once there has been a finding of default TCA cannot challenge defendant's right to pursue the remedies which are provided for in the agreement in the event of such default; (b) the New York Supreme Court previously ruled that the issues sought to be raised by the fourth cause of action were subject to arbitration; and (c) the issues sought to be raised in the fourth cause of action were in fact raised in the arbitration and there determined adversely to plaintiff.

FIFTH CAUSE OF ACTION

24. The fifth cause of action appears to be a variation on the fourth cause of action, with the added allegation that because the agreement provides for termination for defaults which are not material or substantial and provides for excessive damages, Section 9.2 of the agreement is unenforceable under New York law as a penal provision.

25. Those provisions of the agreement which give defendant the right of termination in the event of specified events of default go to the heart of the agreement. In alleging that these provisions are unenforceable as penal provisions, plaintiff is attacking the entire agreement.

26. The agreement was no different in September 1970, when defendant first demanded arbitration and plaintiff's predecessor moved to stay arbitration, than it is now. Surely TCA did not think that defendant was submitting to arbitration the question of TCA's default and the question of whether defendant

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followed the proper procedures in terminating the agreement, merely as an academic exercise. TCA knew, as the agreement clearly provides, that once it was determined that there was an event of default at the time of termination, then defendant's remedies, including termination and the right to collect rentals (subject to credits and adjustments where the aircraft is leased to another carrier or used by defendant) followed automatically under the terms of the agreement. If TCA felt that these remedies constituted a penal provision and were unenforceable under New York law, this issue should have been raised on TCA's motion to stay arbitration and in its accompanying request for a declaratory judgment that it had no further obligation to defendant under the agreement.

27. TCA in fact did allege in its amended petition on its motion to stay arbitration (Moving Affid. Ex. E, para. 17), as it alleges in the fifth cause of action, that:

"Said Section 9.2 . . . provides in part that 'If one or more events of default enumerated in Section 9.1 shall occur, and while such event of default shall be continuing, then and in any such event . . . ' AET may take certain action and seek certain remedies as set forth in said Section. These remedies, *some of which are unconscionable*, include among other things, immediate repossession of the aircraft, and immediate collection of various rents and expenses." (Emphasis supplied.)

However, TCA failed to assert that because of the foregoing, the agreement (or defendant's remedies thereunder) was unenforceable.

28. The New York Courts having determined that the issues sought to be raised by TCA's request for a declaratory judgment were issues which should be determined by the arbitrators, TCA proceeded to seek in the arbitration the same relief which it had

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sought in its request for a declaratory judgment, namely, a declaration that it had no further obligation to defendant under the agreement and that it was entitled to a refund of advance payments made thereunder. One of the two grounds for this requested relief was, as alleged in the fifth cause of action, that defendant improperly terminated the agreement (the other ground being that the aircraft were not lawfully registrable in the United States).

29. Again, however, though it contended that defendant was not entitled to terminate the agreement, TCA did not ask the arbitrators to find that the agreement (or the remedies given to defendant thereunder) was unenforceable. Indeed TCA tacitly conceded the enforceability of the agreement and defendant's remedies thereunder in the following statements from its Answering Statement and Counterclaim (Moving Affid. Ex. L., p. 4) and its Post-Hearing Memorandum (Moving Affid. Ex. M, p. 55):

Answering Statement:

"In this proceeding AET seeks a declaration as to TCA's defaults in order to hold TCA responsible for damages under the Agreement . . ."

Post-Hearing Memorandum:

"D. AET's virtually conceded purpose in terminating, was and is to obtain from TCA, as damages under the Agreement, the rents it could not lawfully have obtained under the lease because the aircraft could not be registered in the United States. AET seeks a ruling in this arbitration that the termination was authorized, in order to use that ruling in court as a basis for claiming damages. Such a ruling for AET cannot possibly be justified. Furthermore, the result AET seeks would violate the registration and cabotage principles, since AET would be obtaining indirectly as damages what it could never have lawfully obtained as rent."

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30. Its predecessor having thus failed to raise prior to the arbitration the issues sought to be raised in the fifth cause of action, and having proceeded to arbitration under this supposedly unenforceable agreement and again not raised these issues, plaintiff is now estopped from seeking to raise these issues after the arbitration.

31. There is also an additional ground on which plaintiff is estopped from seeking to raise this issue. In Section 11 of the agreement, a copy of which is annexed hereto as Exhibit E, TCA made affirmative representations, warranties and covenants, including the following:

"SECTION 11: REPRESENTATIONS AND WARRANTIES OF
TCA

"TCA represents, warrants and covenants to AET:

* * *

"11.2—* * * This agreement and any lease to be entered into pursuant hereto . . . constitute and will constitute . . . the valid and binding obligation of TCA enforceable in accordance with their terms.

"11.3—There is to its knowledge no law, governmental rule, regulation or order . . . which would be contravened by the execution, delivery or performance by TCA of the terms of this agreement and any lease to be entered into pursuant hereto.

* * *

"11.6—Neither the execution nor delivery of this Agreement or any lease entered into pursuant hereto nor fulfillment of or compliance with the terms and provisions thereof will contravene any provision of law * * *

32. Plaintiff's predecessor having made the foregoing affirmative representations, warranties and covenants, plaintiff is now estopped from claiming that they are false.

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33. In summary, plaintiff's eleventh hour attempt to cure the defects in its Original complaint is ineffective. The factual allegations in both complaints are substantially the same, and adding new conclusory allegations adds nothing. If the Original complaint should have been dismissed (as plaintiff implicitly concedes by its service of an Amended complaint), the Amended complaint should also be dismissed. In any event, whatever additional arguments may have been made in the Amended complaint are arguments which either were raised or should have been raised on TCA's motion to stay arbitration or in the arbitration proceeding itself. The New York Supreme Court, where plaintiff's predecessor in interest first sought a stay of arbitration and where plaintiff's application to vacate the arbitration award is presently pending, is the proper forum, and that proceeding the proper proceeding, for determining any issues concerning the arbitration award. Plaintiff's attempt to collaterally attack the arbitration award in this Court, though skillfully formulated, must fail. The Amended complaint and the action should be dismissed, without leave to serve a further amended complaint.

WHEREFORE, it is respectfully requested that the Amended complaint and the within action be dismissed, without leave to serve any further Amended complaint.

LUDWIG A. SASKOR
Ludwig A. Saskor

(Sworn to by Ludwig A. Saskor on February 28, 1973.)

A 140

Exhibit A

Amended Complaint (see supra at A 3-10)

Exhibit A to Item 4

A 141

Exhibit B

Complaint (see supra at A 58-62)

Exhibit B to Item 4

Exhibit C

**DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION**

Washington, D. C. 20590

November 3, 1970
Preston G. Gaddis II, Esq.
Crowe, Dunlevy, Thweatt, Swinford,
Johnson & Burdick
Attorneys and Counselors at Law
100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Dear Mr. Gaddis:

This is in reply to your letter of 21 August 1970 concerning an Agreement of 8 February 1970 involving leases of aircraft with option to purchase, entered into between Aerlinnte Eireann Teoranta (AET), lessor, and Trans Caribbean Airways, Inc. (TCA), lessee. You ask in effect whether the aircraft, while under lease to TCA, will be eligible for U. S. registration in the name of TCA as owner under secs. 501(b)(1) and 101(16)(b) of the Federal Aviation Act of 1958 and Federal Aviation Regulations Part 47, especially §§ 47.5(c) and 47.43(a)(4).

We have reviewed what appear to us to be the pertinent provisions of the aforesaid Agreement, Exhibit 1 thereto entitled "Aircraft Lease Agreement With Option to Purchase" (unexecuted), Letter Agreement No. 1 thereto of the same date, and a draft "Aircraft Lease Agreement With Option to Purchase" which is virtually identical with "Exhibit 1." We understand and interpret these provisions as follows:

1. AET will lease to TCA one aircraft (Plane No. 1) for an "Initial Period" from delivery to AET to 15 May 1971, and Planes No. 1 and 2 during the four subsequent periods between 15 October and 15 May, annually (the last such period thus ending 15 May 1975), but limited to 10 months for both aircraft in any such period. Separate "Aircraft Lease Agreements," per

Exhibit C to Item 4

Exhibit C

Exhibit 1, are to be entered for each of such "available periods." Letter Agreement No. 1 gives TCA an option to renew the Agreement, under specified conditions, for an additional term of five years.

2. The lessee is required to make monthly payments computed as a function of the total cost of the aircraft and an interest charge and equalized for all leases. Pending calculation the monthly charge for each aircraft is £280,000.

3. While on lease to TCA, the aircraft must bear a conspicuous name plate stating that AET is the owner of the aircraft.

4. The lessee is granted an option to purchase the aircraft during any of the lease terms. In order to exercise the option the lessee must pay a sum equal to 115% of the cost of a new aircraft of similar type to be ascertained from Boeing Company within 60 days prior to the commencement of the respective lease term, plus any rental payments theretofore made or due on the respective aircraft.

5. Any "Aircraft Lease Agreement With Option to Purchase" is to terminate in the event that TCA is unable to obtain United States registration of the aircraft. If this causes cancellation of the lease for the Initial Period and the relevant condition cannot be cured, the entire Agreement terminates.

For present purposes we assume that all relevant provisions are valid under the law of New York which governs the Agreement.

F. A. R. § 47.5(c) provides that the "owner" in whose name an aircraft must be registered under § 47.5(b) includes "a lessee of an aircraft under a contract of conditional sale." Conditional sale is defined, as far as here pertinent, in sec. 101(16)(b) of the Federal Aviation Act as

Exhibit C to Item 4

Exhibit C

(b) Any contract for the bailment or leasing of an aircraft . . . by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which the bailee or lessee is bound to become, or has the option of becoming, the owner thereof upon full compliance with the terms of the contract. . . ."

Under the contract, the compensation payable in case of exercise of the purchase option is 115 percent of the then new value of the aircraft. Yet only Plane No. 1, at the beginning of the "Initial Period," will be new and Plane No. 2 will be about half a year old when first leased, if contemplated delivery schedules are met. Thereafter both airplanes will of course become successively older, so that the discrepancy between their market value and the 115 percent of new value may be expected to correspondingly increase.

In addition, the sum paid by a lessee as "compensation" within the meaning of sec. 101(16) has been held to include rental payments required by the term of the contract prior to exercise of the option. The "compensation" would therefore increase by the rental payments made during each lease agreement.

The significant facts on this case appear to militate against treating as effecting a conditional sale the agreements, which the parties have identified as constituting a lease or leases of the aircraft. The agreements contemplate a notice of ownership affixed to the aircraft which would contradict the registration in the name TCA as owner; a periodic transfer and retransfer of possession more characteristic of a series of short-term lease arrangements; and a payment for the exercise of the option probably exceeding the then value of the aircraft (to an increasing extent with the passage of time) and affording no credit for prior rental payments.

In the circumstances we have concluded that the agreements you have furnished us should not be treated as affecting a conditional sale of the aircraft to TCA for purposes of registration.

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Exhibit C

Inasmuch as, under our conclusion, TCA would not be considered the owner of the aircraft for registration purposes, it is unnecessary to consider further whether registration to TCA would be invalid under Section 47.43 of the Federal Aviation Regulations.

We are furnishing you this opinion, solely on the basis of the materials you have furnished us, because of your interest in the matter as counsel for American Airlines which, you have advised, would succeed to TCA's interest in the agreements by reason of an impending merger with TCA. A copy of this letter is being sent to Stephen L. Babcock, Esquire, 1100 Connecticut Avenue, N. W., Washington, D. C. 20036, who, we understand, is acting as counsel for AET in the matter of this Agreement.

Sincerely,

OSCAR SHIENBROOD
Oscar Shienbrood

Acting Associate General Counsel
General Legal Services Division, GC-10

Exhibit D
Opposing Affidavit

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Index No. 16308/1970

In The Matter of The Application of
TRANS CARIBBEAN AIRWAYS, INC.,

Petitioner,

For A Judgment Staying The Arbitration Commenced By
Aerlinte Eireann Teoranta, And For A Declaratory Judgment
against

AERLINTE EIREANN TEORANTA AND AMERICAN
ARBITRATION ASSOCIATION, INC.

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEONARD H. STEIBEL, being duly sworn, deposes and says:

1. I am an attorney at law and member of the firm of Smith and Steibel, attorneys for respondent Aerlinte Eireann Teoranta ("AET"). I submit his affidavit in opposition to petitioner's motion to stay arbitration and for a declaratory judgment.

ARBITRABILITY OF THE DISPUTE

2. The dispute between the parties arises under an agreement of February 8, 1968 which provides, in essence, for petitioner to lease from AET, with option to purchase, two Boeing

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*Exhibit D**Opposing Affidavit*

747 jet aircraft over a five-year period ("the Agreement"). The petition admits that the Agreement contains an arbitration clause. AET terminated the Agreement on September 2, 1970 on the ground that petitioner was in default thereunder. A copy of AET's notice of termination is annexed hereto as Exhibit A. On or about September 4, 1970, petitioner sent a cable to AET in which petitioner acknowledged receipt of said notice and, in the words of the petition, "denied it was in default and confirmed its willingness to perform its obligations under the Agreement" (Petition, para. 11). A copy of said cable is annexed hereto as Exhibit B. Thereupon, after further communications between the parties in which each side reiterated its position (copies of said communication are annexed hereto as Exhibits C-1 through C-4,) AET submitted the dispute to arbitration.

3. As is clear from the notice of termination and petitioner's response thereto, the dispute between the parties is whether or not petitioner was in default under the Agreement. If petitioner was in default, AET had the right to terminate the Agreement. If petitioner was not in default, AET did not have the right to terminate the Agreement. Section 9.1 of the Agreement, a copy of which section is annexed hereto as Exhibit "D", specifies those acts or omissions of petitioner which constitute an "event of default" under the Agreement. After specifying such "events of default", section 9.1 concludes with the following language:

"then in the happening of any of the foregoing Events of Default AET shall have the remedies set forth in section 9.2."

4. Section 9.2 of the Agreement, a copy of which section is annexed hereto as Exhibit "E", then goes on to provide for AET's remedies where there has been an "event of default." The language of said section 9.2 starts out as follows:

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Opposing Affidavit

"SECTION 9.2—Remedies

"If one or more events of default enumerated in section 9.1 shall occur, and while such event of default shall be continuing, then in any such event:"

The balance of Section 9.2 then specifies what these remedies are. Included among these remedies are the right to terminate the Agreement (para. "A"). After specifying these remedies, said section 9.2 then provides, at page 9-10 of the Agreement:

"In addition, AET may proceed to protect and enforce its rights by any action, suit or proceedings (in equity or at law) whether for specific performance of any covenants or agreement or in aid of the exercise of any power granted by this Agreement."

5. The arbitration clause in the Agreement is contained in section 13.7 thereof, which reads:

"13.7—Arbitration

Except as herein provided to the contrary in section 9.2, any dispute concerning the validity, interpretation or application of this agreement, or any amendments thereto, or concerning any rights or obligation based on or in relation to such agreement and which cannot be resolved by the parties, hereto, shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association."

6. Thus the pattern of the Agreement, as it relates to this proceeding, is clear. Section 9.1 specifies those acts or omissions which constitute an "event of default" (and in appropriate cases requires notice and an opportunity to cure such default). Section 9.2 is concerned solely with AET's remedies once an

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"event of default" has occurred. Section 13.7 in effect provides that all disputes under the Agreement (including any dispute as to whether or not there has been an "event of default") are subject to arbitration. The only matter which is not subject to arbitration under the Agreement is the question of what remedies AET may pursue, AET being given the express right under the Agreement to exercise specified remedies in the event of default and, if necessary, to enforce the same in a Court of law.

7. Our office acts as general counsel for AET in North America and represented AET throughout the negotiation and drafting of the Agreement. I personally handled the negotiations and drafting on behalf of our office.

8. As heretofore noted, I believe that the Agreement is clear, unambiguous and unequivocal. Questions of default are covered by Section 9.1 and questions of remedy by Section 9.2. Questions of default are subject to arbitration; questions of remedy are not. In the light of this clear dichotomy between default and remedies, I do not see how petitioner can in good faith assert that the present dispute between the parties, which is limited to questions of default, is not subject to arbitration. However, should the Court determine that there is some ambiguity in the Agreement with respect to this question, then presumably the Court would want to consider parol evidence as to the intent of the parties.

9. The exclusionary language in the arbitration clause was discussed with the petitioner's representatives and counsel during the negotiations. At that time we discussed that the effect of this arbitration clause was that all disputes under the Agreement were to be arbitrable, except for our remedies. We made clear to petitioner that the reason for this one exclusion was that once there was a default we wanted to be able to invoke our remedies

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immediately and we did not want there to be any question about our remedies. Petitioner understood this and did not object thereto.

10. The foregoing arbitration clause is sensible and reasonable. There may possibly be a bona fide dispute between the parties as to whether an "event of default" has occurred (though I do not believe there is any genuine dispute in this case). If so, this is a matter which is amenable to arbitration. However, once it has been determined that an "event of default" has occurred, there is no reason why the remedies which may be pursued on account of such default—which remedies are clearly spelled out in the Agreement—need be submitted to arbitration. In any event this is what the Agreement clearly and unambiguously provides, and what the parties agreed to.

11. Moreover, such an exclusion is virtually an economic necessity, and certainly economically desirable, in an agreement of this nature. As of March, 1971, the Agreement would have covered two Boeing 747 aircraft having a value of many millions of dollars. The standing charges on such an aircraft are very high. For one of these aircraft to stand idle for even one day is a substantial expense. Among the remedies provided under the Agreement in the case of a default by petitioner, is AET's right to immediately retake possession of the aircraft. If petitioner defaulted once the aircraft were in its possession (the defaults here occurred before possession of either of the aircraft had been transferred to petitioner), AET would undoubtedly want to retake possession of the aircraft immediately and either use the aircraft on its own routes or seek to re-lease the aircraft, both of which rights it has under Section 9.2. If petitioner could frustrate this right by taking the question of our remedies to arbitration, the aircraft could be standing idle for several months until the arbitration was decided. Even if it were not standing idle during this period, nevertheless AET would not be able to negotiate

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another lease for the aircraft until its remedies were decided upon by the arbitration panel.

12. In light of the foregoing, petitioner's attempt to submit to this Court the question of whether petitioner is in default under the Agreement is not understandable. Whether or not petitioner is in default under this Agreement is, as heretofore noted, determined by Section 9.1, not Section 9.2. Disputes under Section 9.1 are not excluded from arbitration. The arbitration clause is clear and unambiguous. Had the parties intended to exclude questions of default from arbitration, it would have been a simple matter to so provide in the Agreement. The Agreement does not so provide.

13. The weakness of petitioner's position is very simply revealed by considering what the effect would be if that position were upheld. The arbitration clause is a broad one. It is apparent that except for the one exclusion appearing therein, the arbitration clause was intended to cover all disputes arising between the parties. Virtually every dispute that could arise under the Agreement would involve a question of whether a party was in default in the performance of its obligations. Yet, as petitioner interprets the Agreement, questions of default are not arbitrable (or at least questions of petitioner's default). The logical question is: *If questions of default are not arbitrable under the Agreement, what is?*

14. In short, if petitioner's position were accepted virtually no dispute arising under the Agreement would be subject to arbitration, and this broad arbitration clause would be meaningless. Clearly, this is not the effect of the arbitration clause and was not the intent of the parties.

15. Since the question of petitioner's default is an arbitrable issue under the Agreement, the balance of the petition, which

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seeks to show that in fact petitioner was not in default, is academic. Indeed this issue of whether petitioner was in fact in default would be equally academic on this motion even if it were determined the question of default were not an arbitrable issue under the Agreement. In that event, the Court's sole purpose on this motion would be to determine that this were not an arbitrable issue, and to permanently stay the arbitration proceeding accordingly. In no event would it be for this Court, on a motion to stay arbitration, to determine the merits of the issue between the parties.

16. As the merits of the controversy can in no event be before this Court on this motion, AET will not be drawn into an argument on the merits. Suffice it to note that in our judgment petitioner is indeed in default under the Agreement.

17. In any event, if petitioner feels that it was not in default under the Agreement, it may present its evidence and make its argument to the agreed forum for determining that issue, the American Arbitration Association.

THE DEMAND FOR ARBITRATION

18. AET's first demand for arbitration was served on petitioner on September 23, 1970 ("the First Demand"). A copy of the First Demand is annexed hereto as Exhibit F.

19. On or about October 2, 1970 petitioner moved to stay arbitration under the First Demand on the identical grounds asserted in the amended petition. In the original petition, a copy of which is annexed hereto as Exhibit G, petitioner asserted that the First Demand was defective and improper on the ground, inter alia, that it failed to set forth the remedy sought. Paragraphs "16" and "17" of the original petition read in pertinent part:

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"16. AET's Demand attached hereto as Exhibit A, is defective and improper in that it fails to contain a statement setting forth the nature of the dispute and the amount involved, if any. Said Demand asserts only that TCA 'failed to perform the terms of the Contract.' In addition, the Demand fails to specify the remedy sought since it seeks merely a declaration that TCA was in default under the terms of the Contract and that in terminating the Contract AET followed prescribed procedures, without specifying whether such remedy is all or only part of the remedy AET intends to pursue.

"17. Since no agreement was made to arbitrate the issue of whether a default had occurred or was continuing for purposes of Section 9.2 of the Agreement, or the issue of the validity and enforceability of the remedies provided in Section 9.2, and since the Demand is defective in failing to set forth the nature of the dispute, the amount involved, if any, and the remedies sought, the petitioner requests that AET and the AAA be enjoined and stayed from proceeding in the arbitration pending the determination of this proceeding and that, after hearing, a permanent injunction and stay be entered." (Emphasis supplied.)

20. In an order entered October 13, 1970, a copy of which is annexed hereto as Exhibit H, this Court passed on the contentions raised by petitioner in the original petition. The order reads:

"Upon the foregoing papers this motion to stay arbitration is granted on the ground that *the demand for arbitration is defective and improper. It does not disclose the nature of the dispute.* A demand must state the specific issues to be arbitrated (*Nager Electric Co. v. Weisman Constr. Corp.*, 29 AD 2d 939, First Dept.; *Electronic & Missile Facilities Inc. v. Campbell*, 20 AD 2d

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891, First Dept.) In making this determination the court does not reach the question whether there exists a valid agreement 'to arbitrate the issues sought to be arbitrated.'

"The foregoing is without prejudice to the service of a proper demand." (Emphasis supplied.)

21. Thus, this Court found that the First Demand was defective and improper in only one regard: failure to disclose the nature of the dispute. Petitioner's contention that the First Demand was also defective in failing to set forth the remedy sought was in effect rejected.

22. On October 15, 1970, pursuant to the permission granted by said order, AET served a new demand for arbitration on petitioner ("the Second Demand"). A copy of the Second Demand is annexed hereto as Exhibit I.

23. The Second Demand is identical to the First Demand except with respect to its statement of the nature of the dispute. In particular, its statement of the "Claim or Relief Sought" is identical to that contained in the First Demand.

24. It is submitted that this Court's previous rejection of petitioner's assertion that the First Demand failed to set forth the remedy sought constitutes the law of the case, and that petitioner cannot relitigate this issue.

25. If this Court should decide to consider petitioner's contention notwithstanding the prior rejection thereof, then I respectfully refer this Court to the Commercial Arbitration Rules of respondent American Arbitration Association, on which petitioner appears to rely ("the Rules"). A copy of the Rules is annexed hereto as Exhibit J. Section 7(a) thereof provides that a demand for arbitration shall set forth "the amount involved,

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if any" (emphasis supplied). This clearly contemplates that a demand for arbitration need not seek money damages.

26. In any event, any question of whether or not there has been compliance with the Rules is for determination by respondent American Arbitration Association and not this Court. Section 52 of the Rules reads:

"Section 52. INTERPRETATION AND APPLICATION OF RULES—The Arbitrator shall interpret and apply these Rules insofar as they relate to his powers and duties. When there is more than one Arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an Arbitrator or a party may refer the question to the AAA for final decision. *All other Rules shall be interpreted and applied by the AAA.*" (Emphasis supplied).

27. Insofar as the Court found that the First Demand failed to disclose the nature of the dispute, it is submitted that this defect has been cured in the Second Demand. The First Demand merely stated the following under the heading "NATURE OF DISPUTE":

"NATURE OF DISPUTE: Trans Caribbean Airways Inc. has failed to perform the terms of the Contract."

On the other hand, the Second Demand sets forth the nature of the dispute at some length:

"NATURE OF DISPUTE: Whether or not, on September 2, 1970, Trans Caribbean Airways Inc. was in default under the Contract in the following respects:

"1. Failure and refusal to pay the sum of \$85,000 due July 1, 1969;

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"2. Failure and refusal to execute the lease tendered by Aerlinte Eireann Teoranta for Plane No. 1;

"3. Failure and refusal to use its best efforts to promptly obtain all required registrations with and approvals of governmental agencies;

"4. Failure and refusal to do and perform such other and further acts as required by law and reasonably requested by Aerlinte Eireann Teoranta to carry out and effect the intents and purposes of the Contract and the leases required to be executed thereunder."

28. Petitioner's main objection to the statement of the nature of the dispute contained in the Second Demand seems to be directed to items "3" and "4" of AET's specification of the various respects in which petitioner was in default under the agreement. Items "3" and "4" cannot be considered in a vacuum. They must be considered in the light of the Agreement which petitioner is claimed to have violated. In that connection, items "3" and "4" allege petitioner's failure and refusal to comply with specific obligations imposed on petitioner under the Agreement, as set forth in Sections 11.5 and 13.4 thereof. Copies of these sections are annexed hereto as Exhibits K and L, respectively.

29. In view of petitioner's again attempting to stay arbitration notwithstanding AET's restatement of the nature of the dispute in the Second Demand, it appears that petitioner's real concern is less with the form of AET's demand for arbitration than with avoiding a determination of the underlying dispute on the merits. Petitioner has clearly agreed to arbitration, and should not be permitted indefinitely to forestall the day of reckoning by renewed applications to this Court.

DECLARATORY JUDGMENT

30. Paragraphs "29" through "37" of the petition, while not clearly designated as such, in effect constitute a second cause of

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action. This second cause of action is an action for a declaratory judgment. It is not in any way related procedurally to the motion under Article 75 of the Civil Practice Law and Rules to stay arbitration.

31. This is a special proceeding brought on by order to show cause. A special proceeding is proper in connection with a motion to stay arbitration. It is not the proper way, however, to institute an action for a declaratory judgment. It is submitted that an action for declaratory judgment must be instituted in the same manner as a normal action at law, namely by personal service of a summons. There has been no such service of a summons in connection with the declaratory judgment relief sought by petitioner herein. Neither the order to show cause of October 2, 1970 nor the order to show cause of October 23, 1970 makes any reference to the request for a declaratory judgment.

32. Accordingly, it is submitted that this Court has acquired no jurisdiction over the person of AET with respect to the second cause of action.

33. In any event, as heretofore noted, the matters as to which petitioner seeks a declaratory judgment are arbitrable issues under the Agreement. Therefore, it is submitted that this Court has no jurisdiction over the subject matter of the second cause of action.

WHEREFORE, it is respectfully requested that the petition be dismissed and that respondent Aerlinte Eireann Teoranta be granted such other, further and different relief as the Court may deem just and proper.

LEONARD H. STEIBEL
Leonard H. Steibel

(Sworn to by Leonard H. Steibel on November 6, 1970.)

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Exhibit E

Excerpts from Agreement (see supra at A 24-26)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 309 (Judge Wyatt)

AMERICAN AIRLINES, INC.,

Plaintiff,

against

AERLINTE EIREANN TEORANTA,

Defendant.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

ANDREW C. HARTZELL, JR., having been duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Debevoise, Plimpton, Lyons & Gates, attorneys for American Airlines, Inc. ("American"), successor in interest to Trans Caribbean Airways, Inc. ("TCA"). This affidavit is submitted in opposition to the motion by defendant Aerlinte Eireann Teoranta ("AET") to dismiss the amended complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure.

2. In its motion to dismiss, AET argues in substance that the amended complaint amounts to a collateral attack on an arbitration award and that the controversy asserted in the amended complaint has already been determined by the arbitration. This argument totally misconstrues the amended complaint and the issues it raises, and is flatly contradictory to the position previously taken by AET.

3. The present action for a declaratory judgment recognizes that an arbitration proceeding involving AET and TCA was held

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and that an arbitration award was rendered. The action further recognizes that (a) the arbitrators found that TCA was in default under the Agreement in the three respects stated in the award, (b) AET followed "proper procedure in effectuation of cancellation" of the Agreement, and (c) TCA is not entitled to recover on its counterclaim. In short, the present action does not challenge, collaterally or otherwise, the arbitration award.

4. The present action challenges only AET's remedies under the Agreement. The challenged remedies include both AET's right to damages and its asserted right to terminate. As discussed below, these subjects were specifically excluded from arbitration by the arbitration clause of the Agreement, as interpreted and applied by the New York Supreme Court when TCA moved unsuccessfully to stay arbitration. In fact, until its abrupt about-face in filing the present motion to dismiss, AET's counsel has always contended that the subject matter of AET's remedies was *not* subject to arbitration.

THE TCA-AET AGREEMENT

5. The Agreement in dispute was made in 1968 between TCA and AET. (A copy is attached as Exhibit A to American's original complaint.) The Agreement provided that during winter seasons over a period of five years, commencing in the fall of 1970, TCA would lease from AET two Boeing 747 jet aircraft. One aircraft would be leased during the first winter, and two aircraft would be leased during each of the next four winters. TCA was to operate the planes only during the winter months; AET intended to use its planes on its own transatlantic routes during the balance of each year.

6. It was anticipated that the first of the two aircraft would be delivered to TCA by AET on or about November 9, 1970, and that a separate seasonal lease (the form for which was attached as Exhibit 1 to the Agreement) would be executed each winter for each aircraft. Total rents under the Agreement aggregated approximately \$13 million.

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7. In order for TCA to have operated the aircraft on its United States routes, federal law required that the aircraft be registered with the Federal Aviation Administration ("FAA") pursuant to Section 501 of the Federal Aviation Act, 49 U. S. C. § 1401, and the applicable FAA regulations. To register the planes two conditions had to be satisfied: (1) the aircraft had to be owned by a United States citizen, and (2) the aircraft had to be registered in the name of the owner. For purposes of the Agreement, therefore, the aircraft—although in fact owned by AET, a foreigner—had to somehow be registered as if they were owned by TCA. Letter Agreement No. 1 (which was attached to and, by reference, made a part of the Agreement) implicitly recognized the problem inherent in attempting to register the AET aircraft in TCA's name. It provided that,

"In the event that the approval of any Government Agency is required of the Agreement and such approval is not obtained after the necessary application to secure such approval has been made by TCA and promptly pursued by it, the Agreement shall terminate under the conditions provided for in Section 13.1 of the Agreement. If any of the events stipulated in Section 19.2 of Exhibit 1 of the Agreement occur and as a result of which the lease for the Initial Period is cancelled and, if AET and TCA, notwithstanding their best efforts, are unable to cure the relevant condition, the Agreement shall terminate under the conditions provided for in Section 13.1 of the Agreement."

"Exhibit 1", the standard seasonal lease form, provided in substance that if notwithstanding TCA's best efforts the aircraft could not be registered in TCA's name with the FAA, the lease would terminate and TCA would have no further liability.

8. Section 9 of the Agreement was entitled "Events of Default by TCA and Remedies." It was divided into two parts—Section 9.1 and Section 9.2.

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9. Section 9.1, entitled "Events of Default by TCA", described conduct by TCA which would constitute "defaults" and which, if not cured after notice from AET, would ripen into "events of default". Such conduct included, among other things:

(a) TCA's failure to make any payment to AET of Rental or Additional Charges or other payment when due under the Agreement or under the terms of any lease;

(b) TCA's failure to execute any lease, as required by the Agreement, within five days after notice; and

(c) TCA's failure in the observance or performance of any of the other covenants, conditions or agreements on the part of TCA contained in the Agreement or in any lease.

10. Section 9.2 of the Agreement, entitled "Remedies", described the "remedies" to which AET might be entitled if an event of default occurred under Section 9.1. The section provided that AET "by notice to TCA specifying the event of default" could terminate the term of the Agreement and any lease thereunder. It further provided that AET could on three days' notice repossess any aircraft, immediately recover all amounts due with respect to the aircraft, alter or modify the aircraft at TCA's expense as AET in its "sole judgment" considered advisable for purposes of reletting the aircraft. Section 9.2 also stated that AET would not be in any way responsible or liable for any failure to relet the aircraft or for any failure, other than an arbitrary or willful failure, to collect any sums due upon such reletting. The section went on to provide that AET could continue to collect rents as if there had been no termination or repossession, subject only to certain net credits after expenses for such reletting as occurred and for AET's own use of the aircraft. If after termination of the Agreement AET operated the aircraft on its own routes during the winter seasons, TCA was entitled to a credit of only 50 percent of the applicable ren-

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tal rate, regardless of the amount of net income generated by AET's own use of the plane. AET was further given the option to accelerate collection of full rents at the beginning of each winter season. Finally, AET was given the further option to collect at any time the entire payments due under all remaining winter leases, less a rental value (to be determined) and an interest discount. The Section provided that AET could proceed to protect and enforce its remedies by "any action, suit or proceedings in law or in equity." In short, the Section was completely lopsided and dealt only with AET's remedies. There was no comparable provision for TCA.

11. Section 13.7 of the Agreement contained an arbitration clause which provided that,

"Except as herein provided to the contrary in Section 9.2, any dispute concerning the validity, interpretation or application of this agreement, or any amendments thereto, or concerning any rights or obligation based on or in relation to such agreement and which cannot be resolved by the parties hereto, shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association."
(Emphasis added.)

This clause, as argued by AET and as interpreted by the New York State Supreme Court on TCA's unsuccessful application to stay the arbitration, meant that all questions as to AET's remedies upon the happening of any default were excluded from arbitration. The question of what remedies AET was entitled to exercise, if the arbitrators found TCA in default, was left for decision in the courts. This distinction is vitally important to the present motion. It explains why only the default issues were submitted to arbitration, and—now that the arbitrators have found such default existed—why the question of AET's remedies is properly before this Court for determination.

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ORIGIN OF THE DISPUTE

12. The Agreement was made in early 1968, almost three years before the delivery date for the first aircraft, which TCA was to lease in the fall of 1970. In January 1970 American and TCA announced plans for the merger of TCA into American. The merger required various corporate and governmental approval and was not consummated until March 1971. In the meantime, as potential successor in interest to TCA, American began to examine various aspects of TCA's operations. In connection with this examination, American became aware during the summer of 1970 that the Agreement raised a serious registration problem under federal law.

13. The internal air commerce of the United States has always been a jealously guarded preserve, which since the beginning of aviation has been reserved exclusively to citizens of the United States. Neither foreign owners nor foreign aircraft have ever been allowed to carry passengers or to operate on internal air commerce routes. The registration requirement, restricting operations of commercial aircraft in the United States to aircraft owned by United States citizens, and requiring registration to be only in the name of a United States citizen-owner, is the basic mechanism by which foreigners and foreign aircraft are excluded from operating in the internal air commerce of the United States.

14. In view of the high expenditure required to prepare for and schedule the AET aircraft on TCA's domestic routes, and the fact that if the merger went through American would inherit the entire situation, American in July 1970 raised the registration question as an urgent matter with TCA and with the attorneys for AET. (A copy of American's letter is attached hereto as Exhibit A.) It received no satisfactory explanation as to how the parties expected lawfully to register the aircraft in this country, especially in light of Section 47.43(a)(4) of the Federal Aviation Regulations, which pointedly provided:

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"The registration of an aircraft is invalid if, at the time it is made . . . the applicant is a citizen of the United States, but his interest in the aircraft was created by a transaction that was not entered into in good faith and was made to avoid (with or without the owner's knowledge) compliance with section 501 of the Federal Aviation Act of 1958 . . . that prevents registration of an aircraft owned by a person who is not a citizen of the United States." 14 C. F. R. § 47.43(a)(4). (Emphasis added.)

Consequently, on August 21, 1970, American wrote to the FAA, setting forth the facts, and asking whether the AET aircraft could lawfully be registered by TCA as owner and flown on its United States routes.

15. The FAA immediately advised AET of American's request for an opinion. AET then wrote to American, complaining that American was interfering with the Agreement. In a reply letter dated August 27, American's General Counsel advised AET that if the aircraft could be lawfully registered, American had "no intention of taking any action to block the lease or otherwise hinder its performance by TCA or by American after consummation of the merger." He also informed AET, however, that American would not be a party to any attempt to register the planes by withholding pertinent information as to their true ownership by a foreign carrier like AET. (A copy of this letter is attached hereto as Exhibit B.) One day after receiving this letter, AET terminated the Agreement.

16. On November 3, 1970 the FAA issued an opinion letter, holding in effect that AET's planes could not be legally registered in TCA's name and hence could not lawfully be flown on TCA's United States routes. A copy of the FAA opinion letter is attached hereto as Exhibit C.

TERMINATION BY AET

17. On September 2, 1970, one day after receiving the reply from American's General Counsel and some two months

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prior to the commencement of the first winter season, AET notified TCA that it was terminating the term of the Agreement. The termination notice was based on *two* alleged defaults by TCA:

(a) TCA's failure to make an \$85,000 advance payment originally due July 1, 1969. (TCA's position was that AET had previously agreed and acquiesced to a postponement of this payment, and that, although the \$85,000 payment was concededly to be made in the future, no new deadline had been fixed and no notice had been given that AET would suddenly treat the delay as a default and would send a surprise notice terminating the entire arrangement.)

(b) TCA's failure to execute the first seasonal lease within five days after it was sent to TCA in July 1970. (TCA's position was that the deadline for execution was not until September 9, 1970 and therefore had not arrived when AET terminated. TCA also asserted that execution of the lease, the form of which was fixed in Exhibit 1 of the Agreement, was in any event routine and was insufficient ground for the drastic move of terminating the entire arrangement.)

18. Within one day after receipt of AET's surprise termination notice based on these insignificant "defaults", TCA tendered the \$85,000 payment. Within two days TCA executed and tendered the executed seasonal lease. AET rejected both tenders, thus making clear that its purpose was to bring the Agreement to an end on the basis of two technical defaults. In addition, AET notified TCA that it would submit to arbitration the question of TCA's defaults, as well as the additional issue—not mentioned in its termination notice—of whether TCA was in default in failing to use best efforts to obtain registration of the AET aircraft in the United States.

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19. It was never seriously contended that AET terminated because of the delinquent \$85,000 advance payment or the failure of TCA to execute the first seasonal lease. TCA claimed that the time for making the advance payment had been extended by AET, and that the time for executing the first seasonal lease had not yet arrived. But regardless of the merits of those contentions, it was and is undisputed that these items were *de minimis* in the context of the Agreement as a whole, that they were of no economic significance to AET, and that but for the registration problem AET would never have terminated. The obvious reason for AET's termination was to avoid going ahead with the Agreement once the registration issue had come to light, since AET knew the planes could not lawfully be registered. By terminating the Agreement on the basis of two technical alleged defaults, AET hoped to collect the rents as a damage remedy without ever having to face up to the fact that the Agreement would have come to an end, by its own terms, because of non-registrability. So far it has succeeded in this strategy by obtaining from the arbitrators a finding that TCA was in default. But the question of whether AET can succeed to the extent of collecting damages—that is, its remedies under Section 9.2 of the Agreement—is the question before the Court in this case.

TCA'S APPLICATION TO
STAY THE ARBITRATION

20. On September 23, 1970, AET served on TCA a Demand for Arbitration. TCA moved to stay the arbitration and the motion was granted, without prejudice to refile, because of a defect in the form of the Demand.

21. On October 15 AET filed an amended Demand for Arbitration, and TCA again moved for a stay. In support of its motion TCA argued that, since AET had terminated, the question of TCA's defaults could only sensibly be considered in the context of the drastic act of termination taken by AET and the damages it intended ultimately to seek—that is, in the context

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of AET's remedies under Section 9.2 of the Agreement. Both parties agreed that under Section 9.2 the question of AET's remedies was specifically excluded from arbitration by the introductory clause of Section 13.7 of the Agreement. TCA therefore argued that the arbitration clause should not be read to apply to a part of the dispute, since even if defaults were found by the arbitrators, the consequences of those defaults would have to be dealt with in a later and separate court action. TCA also asserted that it had not been in default and was therefore entitled to a declaration that (a) it had no further obligations under the Agreement, and (b) it was entitled to recover its downpayments.

22. AET resisted TCA's motion for a stay, contending that AET sought to arbitrate only the question of whether "defaults" had occurred under Section 9.1, not whether AET was entitled to any "remedy"—which included the right to terminate or recover damages—under Section 9.2. For example, in the affidavit of Ludwig A. Saskor, dated October 6, 1970 and submitted in opposition to TCA's initial motion for a stay, AET stated that,

"6. Thus the pattern of the Agreement, as it relates to this proceeding, is clear. Section 9.1 specifies those acts or omissions which constitute a default by . . . [TCA]. Section 9.2 is concerned solely with AET's remedies once such default has been established. Section 13.7 in effect provides that all disputes under the Agreement, including any dispute as to whether or not TCA is in default under the Agreement, are subject to arbitration. The only subject which is *not subject to arbitration under the Agreement is the question of what remedies AET may pursue in the event of . . . [TCA's] default, AET being given the express right under the Agreement to exercise specified remedies in the event of AET's default and, if necessary, to enforce the same in a court of law.*" (Emphasis added.)

A copy of the relevant pages of the Saskor Affidavit is attached hereto as Exhibit D.

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23. A similar statement appeared in AET's memorandum of law in opposition to TCA's motion to stay arbitration. There, AET argued that,

"The Agreement contains a broad arbitration clause which covers all disputes under the Agreement, 'except as herein provided to the contrary in section 9.2'. In other words, *the Agreement excludes from arbitration any question of the remedies which may be pursued by AET in the event of . . . [TCA's] default*, since these remedies are specified at length in section 9.2."

* * *

"The petition, together with its attachments, clearly shows that the dispute between the parties is whether petitioner [TCA] was in default under the Agreement and that this is an arbitrable issue under the Agreement. *The petition also shows that the sole subject excluded from arbitration under the Agreement is the question of what remedies AET may pursue in the event of such default, and that AET has not sought any arbitration of that issue . . .*" (Emphasis added.)

A copy of the relevant pages of AET's memorandum of law is attached hereto as Exhibit E.

24. In response to TCA's argument that AET was in effect requesting a determination of defaults "in a vacuum without consideration of the remedies it intends to seek in a subsequent lawsuit," AET replied in its supplemental memorandum that,

"The thrust of petitioner's [TCA] argument . . . appears to be that it would be unreasonable and a 'misuse of the arbitration process' to expect the arbitrators to determine questions of default without simultaneously therewith determining questions of remedy.

"The simple answer to petitioner's argument is that *this is precisely what the parties agreed to.*" (Emphasis in original.)

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Copies of the relevant pages from AET's supplemental memorandum, together with other similar statements made by AET in opposing TCA's motion for a stay of arbitration, are attached hereto as Exhibit F.

25. Accepting AET's distinction between issues arbitrable under Section 9.1 (was there a default?) and issues *not* arbitrable under Section 9.2 (if so, what are AET's remedies, if any?), Justice James J. Leff denied TCA's motion for a stay. His opinion expressly construed the arbitration clause to exclude from arbitration questions as to what remedies AET might have if, as alleged, an event of default had occurred. Thus, Justice Leff stated that,

"The only matter which is not subject to arbitration under the agreement is the question of what remedies AET may pursue, AET being given the express right under the agreement to exercise specified remedies in the event of default and, if necessary, to enforce same in a court of law." (Emphasis added.)

In addition, since TCA's request for a declaration concerning its right to recover downpayments depended upon a resolution of the issue of TCA's defaults, Justice Leff also ruled that TCA's counterclaims could be submitted to the arbitrators.

26. Justice Leff's ruling, a copy of which is attached hereto as Exhibit G, was affirmed on appeal. Thus, the arbitration from the outset was confined to issues of "default", despite TCA's contention that such a bifurcated proceeding would be a wasteful prelude to the subsequent litigation in which a court would necessarily have to deal with the validity, scope and availability of AET's remedies. It should be noted, as both Justice Leff and AET's counsel stated, that since AET could attempt to enforce its remedies "in a court of law" in the event of a default, then obviously TCA (and hence American) has the same right to come to this Court for a declaratory judgment that such remedies are unenforceable. That is what it has done in the instant case.

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27. In the meantime, and while appeal was pending from Justice Leff's ruling, TCA was required to and did submit an answering statement in the arbitration proceeding. TCA's Answering Statement and Counterclaim asserted, among other things, that TCA was not in default when AET terminated, that TCA therefore had no further obligation under the Agreement, and that TCA was entitled to recover its downpayments of \$335,000.

28. Neither the Demand for Arbitration nor the Answering Statement submitted to the arbitrators for decision any questions relating to AET's remedies, since these matters had been excluded from the arbitration. TCA's Answering Statement did raise questions concerning the registrability of the aircraft, but did so in order to demonstrate why TCA (and American) had acted in good faith in connection with American's request for an FAA opinion on the issue, and to show that TCA was not therefore in default with respect to its obligation to use "best efforts". As discussed below, the arbitrators' award did not decide the question of registrability, and such a determination was not necessary to the award.

THE ARBITRATION

29. The arbitration hearings commenced December 20, 1971 and continued intermittently for more than six months. All together there were 30 days of hearings, nearly 6,000 pages of testimony and hundreds of exhibits. On January 17, 1973 the arbitrators issued an award, dated January 3. The award, a copy of which is attached hereto as Exhibit H, stated that there was an Event of Default by TCA as of September 2, 1970 on the grounds of:

- (a) TCA's failure to pay the \$85,000 when due;
- (b) TCA's failure to execute the first seasonal lease within five days after notice;
- (c) TCA's failure to use best efforts to register the aircraft; and

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(d) AET's "proper procedure in effectuation of cancellation." (Emphasis added.)

The arbitrators further stated that TCA's counterclaim was dismissed and that the award was "in full settlement of all claims and counterclaims" submitted to the arbitrators.

30. The arbitration award contains no determination as to the remedies, if any, to which AET is or may be entitled. As stated above, these matters were not submitted to arbitration.

31. Shortly after the issuance of the arbitrators' award, AET announced to the press its intention "to press for \$13 million damages". The Wall Street Journal carried an article on January 22, 1973, reporting that,

"Irish International Airlines [AET] said it plans to move 'immediately' to collect \$13 million it claims American Airlines owes it as a result of its victory last week in an arbitration case."

A copy of the Wall Street Journal article is attached hereto as Exhibit I. Aware that AET intended to make such a demand, American commenced the instant action "in a court of law" for a declaration that AET is entitled to no remedies despite the findings of "default" made by the arbitrators.

THE AMENDED COMPLAINT

32. The amended complaint accepts the fact that an arbitration award has been made, that as of September 2, 1970 TCA was found to have been in default under the Agreement in the three respects mentioned above, and that AET was found to have followed "proper procedure in effectuation of cancellation". The amended complaint further recognizes that TCA's counterclaim (for a declaration that AET acted in bad faith, that TCA was entitled to recover its downpayments, and that it had

Item 5

Affidavit in Opposition to Defendant's Motion to Dismiss

no further obligations under the Agreement) was dismissed. Assuming such an award, the amended complaint raises the issue of whether AET is entitled to any of the Section 9.2 remedies—none of which was dealt with in the arbitration.

33. In summary, the amended complaint asserts the following causes of action:

(1) Federal law and public policy prohibit, and have always prohibited, foreign owners of aircraft from using those aircraft in the internal air commerce of the United States, or from deriving revenues from the use of their aircraft in such commerce. AET, which is an Irish corporation wholly owned by the Irish Government and is the owner of the aircraft in question, cannot therefore receive rentals, or damages based on rentals, from the use or proposed use of its aircraft in the United States.

(2) Since the AET-owned aircraft could not have been lawfully registered in the United States under any circumstances, the Agreement would have come to an end by its own terms in November 1970 if AET had not terminated in September 1970. AET by its termination cannot put itself in a better position under the Agreement than it would have been in if it had not terminated. It is not therefore entitled to any rentals or damages.

(3) Since the AET-owned aircraft could not have been lawfully registered in the United States, performance of the Agreement was legally impossible and AET by terminating cannot put itself in a better position under the Agreement than it would have been in otherwise. It is not, therefore, entitled to any rentals or damages.

(4) The technical defaults on which AET terminated were neither material nor substantial and did not give AET the substantive right to terminate—that is, to bring about a forfeiture of the entire Agreement. The

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substantive right of termination, which was one of the Section 9.2 remedies excluded from the scope of the arbitration, was not decided by the arbitration award. The award decided only that AET had followed "proper procedure in effectuation of cancellation." (Emphasis added.) This peculiar language was used because AET's Demand for Arbitration and its consistent position throughout the proceeding was that the arbitrators had no authority to deal with the question of AET's remedies (including its right to terminate) but were authorized only to determine whether the "procedure" followed by AET—that is, sending a notice—was in conformance with the Agreement.

(5) The remedies provided for by the Agreement are penal in nature and therefore cannot be enforced regardless of the default found in the arbitration.

Clearly the amended complaint deals not with matters submitted to arbitration but with the question of remedies expressly excluded from arbitration and left to be decided "in a court of law."

THE MOTION TO DISMISS

34. AET's Motion to Dismiss is replete with factual arguments and extracts from briefs and other pleadings (many of which are taken out of context) in the arbitration and earlier state court proceedings. On the basis of the papers submitted, AET is asking this Court to resolve numerous conflicting conclusions and inferences as to what took place in the prior state court proceedings and in the arbitration. For this reason alone, and without regard to the intrinsic lack of merit of AET's arguments, the instant motion should be denied. Nor can the motion be treated as a motion for summary judgment under Rule 56, since there are a mass of disputed inferences which cannot be resolved at this stage of the case. Moreover, AET has failed to comply with this Court's General Rule 9(g) and has not set forth the undisputed facts on which a summary judgment motion must necessarily proceed.

Affidavit in Opposition to Defendant's Motion to Dismiss

35. Defendant first argues that the amended complaint fails to state a claim because it seeks "to overturn an arbitration award. . . ." (Saskor Affidavit, 2/6/73, at 4) As already explained, the amended complaint does not challenge the award but asserts that, notwithstanding the award, AET is not entitled to the Section 9.2 remedies: a subject expressly excluded from arbitration. AET asserts that the "Agreement spells out in detail the rentals or damages to which defendant is entitled" and that they are "merely a matter of computation." (Saskor Affidavit, 2/6/73, at 4) This, of course, assumes the issue in dispute, since it is for this Court to decide whether such rentals or damages are unlawful and unconscionable and therefore unenforceable.

36. Defendant next contends that the amended complaint is a collateral attack on the arbitration award. For the reasons just stated above, this contention is without merit.

37. Defendant further asserts that since TCA, American's predecessor in interest, moved in the New York State court to stay arbitration, it cannot now come to this federal court to challenge AET's remedies. This is a nonsequitur. TCA's earlier motion in the state court to stay the arbitration was based on the ground that the arbitration clause did not cover the issues sought to be arbitrated. The state court held that the clause did cover such issues, which were limited to the question of who was in default. The extent, legality, and enforceability of AET's Section 9.2 remedies were not issues to be arbitrated but were left for later determination "in a court of law". The earlier state proceeding which ordered the arbitration to go forward did not relate to or resolve the issues raised in this action, and did not and does not in any way impede it. For the same reason, the current proceedings in the state court to confirm the award does not reach the issues raised in this federal action, since confirmation of the award there will end that proceeding. The separate question will still remain: what remedies, if any, can AET obtain? That separate question is the subject of this federal action.

Affidavit in Opposition to Defendant's Motion to Dismiss

38. Defendant argues that plaintiff has waived its right to contend that "performance of the Agreement would have been unlawful and against public policy" (Saskor Affidavit, 2/6/73, at 8), because the argument was not made in September 1970 when AET first demanded arbitration. First, AET's premise is wrong: the Agreement was not unlawful, because it provided by its own terms that it would terminate if the aircraft could not lawfully be registered. Second, the question in 1970 was whether the issues of default asserted by AET should be arbitrated; it was held that they should be, with all questions as to AET's remedies left for later court decision. Thus the issue of remedies—including AET's right to rents and damages when federal requirements would have prevented the use of the aircraft in the United States—was expressly set aside in 1970 from consideration at that time, and TCA waived none of these issues.

39. Nor did the arbitrators decide, as AET mistakenly contends, the question of whether the aircraft could be lawfully registered in the United States. The claim asserted by AET at the arbitration was that TCA on September 2, 1970 was in default for failing to use best efforts to register the aircraft. Actually, TCA had done nothing to question registration. American, as stated above, expected to inherit the situation through merger. It therefore raised the issue in a major way in the summer of 1970 and, before committing more funds to TCA's preparation for the aircraft, sought a formal ruling from the FAA. AET claimed that American's conduct was attributable to TCA and that TCA was therefore in default on its "best efforts" obligation, since American's actions were in bad faith and, according to AET's counsel, created an issue "where none existed." To meet this charge against TCA, extensive evidence was offered at the arbitration, as reflected in some of the extracts from briefs submitted by AET on this motion, to show (a) the depth and seriousness of the registration problem, (b) the legitimacy of American's efforts to have it formally resolved before further commitments were made for the aircraft, and (c)

Affidavit in Opposition to Defendant's Motion to Dismiss

the absence of any conduct by TCA which could be classified as a default on any best efforts obligation to register. The arbitrators determined that TCA was in default, at least on September 2, 1970, for failing to use best efforts to register the aircraft. But the arbitration award does not decide the federal issue of registration itself. It was not necessary for the arbitrators to decide the question, and there is nothing to show that they did.

40. The same conclusion applies to TCA's defenses and counterclaim in the arbitration. TCA asserted in its answering statement that AET, rather than TCA, had acted in bad faith in terminating to avoid the registration issue, and that TCA was entitled to recover its downpayment and had no other obligations under the Agreement. The arbitrators found that TCA, not AET, was in default, and dismissed the counterclaim. There is nothing to suggest that they reached, much less decided, the registration issue.

41. The second Saskor Affidavit, dated February 28, 1973 and submitted in support of the motion to dismiss, makes the additional argument that the second cause of action fails to state a claim because it does not allege that best efforts were made to register the aircraft in November 1970, that these efforts were unsuccessful, that the plane was therefore grounded, or that the Agreement by its terms came to an end. This argument does not meet the claim asserted in the second cause of action. Plaintiff alleges that, even if best efforts *had* been made in November 1970, TCA could not have lawfully registered the aircraft and the Agreement would have ended by its own provisions. Thus AET cannot collect rents or damages. By terminating in September 1970, AET cannot place itself in a better position respecting its right to collect rents, or damages relating to rents, than it would have been in if the Agreement had run its course. It cannot gain by termination what it could not have gained by performance. Furthermore, AET makes a specious contention when it claims that because the arbitrators found a default as to

Affidavit in Opposition to Defendant's Motion to Dismiss

best efforts in September 1970 that finding is *res judicata* with respect to the issue of whether in November 1970 TCA could have lawfully registered the first aircraft if it *had* used best efforts.

42. As to the Fourth Cause of Action, the second Saskor Affidavit does not dispute the undeniable fact that AET's right to terminate was a matter of remedy and hence expressly excluded from the arbitration. But the affidavit nevertheless argues, with complete inconsistency, that the arbitrators in fact decided the question of AET's right to terminate. The self-contradiction is obvious.

43. Furthermore the "extracts" from TCA's amended petition for a stay of the arbitration, from the State Court's decision thereon, and from TCA's answering statement in the arbitration, do nothing to change the fundamental fact that the arbitrators were not permitted to decide on AET's remedies. When TCA moved to stay the arbitration, it contended that the arbitration clause should not be interpreted to apply to questions of default after termination, since such an interpretation would result in multiple litigations: a determination of default in the arbitration and, if AET prevailed in that proceeding, a determination of remedies in a subsequent court action. This is the meaning of the "extracts" appearing in paragraph 15 in the second Saskor Affidavit. At that time AET contended that it did not make any difference that the dispute would be divided, since that was "precisely what the parties agreed to." See *supra* paragraph 24. Similarly, when the state court agreed with AET, it did not rule on the validity of the Section 9.2 remedies, but held only that questions as to these remedies were separately left for decision in a court of law. Finally, TCA's answering statement and counterclaim in the arbitration were based on the proposition that TCA was not in default, and that AET had therefore terminated the Agreement without cause. Having found that TCA *was* in default, the arbitrators dismissed TCA's counterclaim. But they did not decide,

Affidavit in Opposition to Defendant's Motion to Dismiss

and were not authorized to decide, what remedies, if any, were available to AET as a consequence of TCA's defaults.

44. As to the fifth cause of action, AET contends that the remedies provisions go to the heart of the Agreement, flow "automatically" from any finding of default, and cannot be objected to now because no objection was raised prior to the arbitration. For the reasons already stated, questions as to remedies were left to be decided *after* the arbitration, and would not have been reached at all if the arbitrators had found that TCA was not in default. American is therefore not estopped from raising these questions in this Court at this time.

WHEREFORE, American respectfully requests that AET's motion to dismiss the amended complaint should be denied in all respects.

ANDREW C. HARTZELL, JR.
Andrew C. Hartzell, Jr.

(Sworn to by Andrew C. Hartzell, Jr. on March 13, 1973.)

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Exhibit A

**Letter, dated 7/17/70, from Lempert to Rogers (see
supra at A 101-102)**

Exhibit A to Item 5

Exhibit B

Letter dated August 27, 1970, from Overbeck to Dargan

AMERICAN AIRLINES

633 Third Avenue • New York, New York 10017 • 867-1234

Cable Address AMAIR

August 27, 1970

Mr. M. J. Dargan
General Manager
Aer Lingus
P. O. Box 180
Dublin Airport
Dublin, Ireland

Dear Mr. Dargan:

Mr. Spater is out of the country and is not due to be back until September 8. I am therefore taking the liberty of answering your letter of August 25, as I have been personally involved in the actions we have taken with respect to the Boeing 747 aircraft that you propose to lease to Trans Caribbean Airways.

You indicate that certain officials of American "are apparently active in attempting to block the lease". If this refers to certain discussions we have had with the Federal Aviation Administration, there would seem to be a misunderstanding. For this reason, I would like to explain in some detail the actions taken by American's representative in this connection:

1. We reviewed the agreement between your company and Trans Caribbean Airways dated February 8, 1968 in connection with American's proposed merger with TCA. This agreement (and a letter agreement of the same date) expressly contemplated the possibility that the aircraft could not be registered in the United States:

(a) The agreement did not simply state that TCA would register the aircraft; it obliged TCA to use its

Exhibit B to Item 5

Exhibit B

Letter dated August 27, 1970, from Overbeck to Dargan

best efforts" to do so, implicitly recognizing that there might be difficulty in this regard.

(b) The side letter agreement stated that if registration could not be effected, TCA was relieved of any obligation under the agreement.

(c) TCA was given an apparently meaningless option to purchase the aircraft for a price substantially in excess of replacement value. It was explained to us that this option was designed to facilitate registration of the aircraft by TCA.

2. We then reviewed the Federal Aviation Act of 1958 and the Federal Aviation Regulations issued thereunder to determine whether the aircraft would be eligible for registration in the United States. Our conclusion was that it would not be eligible for registration.

3. Not wishing to rely solely upon our own conclusions, we requested an opinion from the firm of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick in Oklahoma City, Oklahoma. This firm specializes in problems relating to registration of aircraft and recordation of liens on aircraft. We received a written opinion from this firm confirming our conclusion that the aircraft would not be eligible for registration. We were told that the only way that registration might be accomplished would be by means of non-disclosure to the FAA of pertinent information, and certification by TCA (or by American after consummation of the merger) that it "owned" the aircraft.

4. We then considered the consequences of TCA (or American) certifying that it "owned" the aircraft without disclosure of the relevant provisions of the lease. We concluded that this would be a highly improper course of conduct:

(a) The only basis for such certification would be the option to purchase, which we knew to be a sham.

Exhibit B to Item 5

Exhibit B

Letter dated August 27, 1970, from Overbeck to Dargan

(b) Section 47.43 of the Federal Aviation Regulations provides that an aircraft registration is invalid if, at the time it is made:

"The applicant is a citizen of the United States, but his interest in the aircraft was created by a transaction that was not entered into in good faith and was made to avoid (with or without the owner's knowledge) compliance with section 501 of the Federal Aviation Act of 1958 (49 U. S. C. 1401), that prevents registration of an aircraft owned by a person who is not a citizen of the United States."

(c) The face of the FAA form to be used in connection with registration of aircraft contains the following warning in bold face type:

"ATTENTION: Read the following statement before signing this application. A false or dishonest answer to any question in this application may be grounds for punishment by fine and/or imprisonment (U. S. Code, Title 18, Sec. 1001)."

(d) The exclusions to TCA's insurance policy indicate that insurance coverage on the aircraft would be voided if it were operated "with the knowledge or consent of an officer . . . in violation of the Civil Air Regulations [now the Federal Aviation Regulations] prescribed by the F. A. A."

5. In light of these facts, it was our conclusion that any registration of the aircraft would have to be based upon a full disclosure to the FAA of the relevant facts and a formal ruling by the FAA that the aircraft was eligible for registration. Accordingly, we asked the firm of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick to request a ruling from the FAA on this question. This was done on August 21 and the matter is now pending.

Exhibit B to Item 5

Exhibit B

Letter dated August 27, 1970, from Overbeck to Dargan

After we had first concluded that the aircraft was not eligible for registration, I understand that counsel for Aer Lingus-Irish requested and received an oral informal ruling from an FAA official in Oklahoma City that the aircraft could in fact be registered. I am not aware of the nature of the representations that your counsel made at this time since no representative of TCA or American was present. Apparently this same official has now informed your counsel of our request for a formal ruling and has requested his comments. I assume it was the latter communication that led you to conclude that certain officials of our company were attempting to "block the lease".

I would like to take this opportunity to assure you that if the FAA concludes that the aircraft is eligible for registration, and issues a formal ruling to that effect, we have no intention of taking any action to block the lease or otherwise hinder its performance by TCA or by American after consummation of the merger. On the other hand, we will not be a party to any efforts to achieve registration through non-disclosure of relevant information.

Your letter and this reply will be brought to Mr. Spater's attention as soon as possible. In the meantime, I would be happy to try to answer any further questions you may have.

Sincerely,

GENE E. OVERBECK

Gene E. Overbeck

Vice President and General Counsel

Exhibit B to Item 5

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Exhibit C

FAA Opinion Letter (see supra at A 142-145)

Exhibit C to Item 5

Exhibit D

Opposing Affidavit of Ludwig A. Saskor (Excerpts)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 16308/1970

In The Matter of The Application of
TRANS CARIBBEAN AIRWAYS, INC.,

Petitioner,

For A Judgment Staying The Arbitration Commenced by
Aerlinte Eireann Teoranta, And For A Declaratory Judgment
against

AERLINTE EIREANN TEORANTA and AMERICAN
ARBITRATION ASSOCIATION, INC.,

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LUDWIG A. SASKOR, being duly sworn, deposes and says:

1. I am an attorney at law associated with Smith & Steibel, attorneys for respondent Aerlinte Eireann Teoranta ("AET"). I submit this affidavit in opposition to Petitioner's motion for a stay of arbitration and for a declaratory judgment.

2. The dispute between the parties arises under an agreement of February 8, 1968 which provides, in essence, for petitioner to lease from AET, with option to purchase certain air-

Exhibit D to Item 5

Opposing Affidavit of Ludwig A. Saskor (Excerpts)

craft over a five-year period ("the Agreement"). The petition admits that the Agreement contains an arbitration clause.

3. Section 9.1 of the Agreement, a copy of which is annexed hereto as Exhibit "A", specifies those acts or omissions of petitioner which constitute an "Event of Default" under the Agreement. After specifying such "Events of Default", section 9.1 concludes with the following language:

"then in the happening of any of the foregoing Events of Default AET shall have the remedies set forth in Section 9.2."

4. Section 9.2 of the Agreement then goes on to provide for AET's remedies in the event of such default. The language of said Section 9.2 starts out as follows:

"SECTION 9.2—Remedies

If one or more events of default enumerated in section 9.1 shall occur, and while such event of default shall be continuing, then in any such event:"

The balance of Section 9.2 then specifies what these remedies are. After specifying said remedies, said section 9.2 then provides, at page 9-10 of the Agreement:

"In addition, AET may proceed to protect and enforce its rights by any action, suit or proceedings (in equity or at law) whether for specific performance of any covenants or agreement or in aid of the exercise of any power granted by this Agreement."

5. The arbitration clause in the Agreement is contained in section 13.7 thereof, which reads:

"13.7—Arbitration

Except as herein provided to the contrary in section 9.2, any dispute concerning the validity, interpretation

Opposing Affidavit of Ludwig A. Saskor (Excerpts)

or application of this agreement, or any amendments thereto, or concerning any rights or obligation based on or in relation to such agreement and which cannot be resolved by the parties hereto, shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association."

6. Thus the pattern of the Agreement, as it relates to this proceeding, is clear. Section 9.1 specifies those acts or omissions which constitute a default by petitioner (and in appropriate cases requires notice and an opportunity to cure such default). Section 9.2 is concerned solely with AET's remedies once such default has been established. Section 13.7 in effect provides that all disputes under the Agreement, including any dispute as to whether or not TCA is in default under the Agreement, are subject to arbitration. The only subject which is not subject to arbitration under the Agreement is the question of what remedies AET may pursue in the event of petitioner's default, AET being given the express right under the Agreement to exercise specified remedies in the event of AET's default and, if necessary, to enforce the same in a court of law.

7. The foregoing arbitration clause is eminently sensible and reasonable. There may possibly be a bona fide dispute between the parties as to whether there has been a default under the Agreement. If so, this is a matter which is amenable to arbitration. Once it has been determined, however, that there has been such a default, then there is no reason why the remedies which may be pursued on account of such default—which remedies are clearly spelled out in the Agreement—need be submitted to arbitration. In any event this is what the Agreement clearly and unambiguously provides, and what the parties both agreed to.

8. In the light of the foregoing, petitioner's attempt to submit to this Court the question of whether petitioner is in default

Opposing Affidavit of Ludwig A. Saskor (Excerpts)

under the Agreement is not understandable. Whether or not petitioner is in default under the Agreement is, as heretofore noted, determined by section 9.1, not 9.2. Disputes under section 9.1 are not excluded from arbitration under the Agreement. The arbitration clause is clear and unambiguous. Had the parties intended to exclude from arbitration any questions of whether TCA is in default under the Agreement, it would have been a simple matter to so provide in the Agreement. The Agreement does not so provide.

9. Since the question of whether petitioner is in default under the Agreement is clearly an arbitrable issue under the Agreement, the balance of the petition, which seeks to show that in fact petitioner was not in default under

* * *

Exhibit E

**Memorandum of Respondent Aerlinte Eireann Teoranta
in Opposition to Motion
for Stay of Arbitration and Declaratory Judgment
(Excerpts)**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

Index No. 16308/1970

In the Matter of The Application of
TRANS CARIBBEAN AIRWAYS, INC.

Petitioner,

For a Judgment Staying The Arbitration Commenced By
Aerlinte Eireann Teoranta, And For A Declaratory Judgment

against

AERLINTE EIREANN TEORANTA and AMERICAN
ARBITRATION ASSOCIATION, INC.

Respondents.

**MEMORANDUM OF RESPONDENT AERLINTE EIREANN TEORANTA
IN OPPOSITION TO MOTION
FOR STAY OF ARBITRATION AND DECLARATORY JUDGMENT**

Petitioner has instituted a special proceeding seeking to stay a pending arbitration between petitioner and respondent Aerlinte Eireann Teoranta ("AET"); and seeking a declaratory judgment that AET wrongfully terminated and repudiated the agreement which is the subject of the arbitration proceeding ("the Agreement"), that petitioner has no further obligation to AET thereunder and that petitioner is entitled to recover certain damages from AET thereunder.

Exhibit E to Item 5

Exhibit E

*Memorandum of Respondent Aerlinde Eireann Teoranta
in Opposition to Motion
for Stay of Arbitration and Declaratory Judgment (Excerpts)*

The petition was brought on by an order to show cause which refers only to petitioner's request for a stay of arbitration. There is no reference in the order to show cause to petitioner's request for a declaratory judgment.

The question submitted to arbitration was whether petitioner violated the terms of the Agreement. This question arises under section 9.1 of the Agreement, which specifies those acts or omissions of petitioner which constitute an "Event of Default" under the Agreement (and, where appropriate, prescribes a period of notice and an opportunity to cure such default).

Once there has been a default by petitioner, section 9.2 of the Agreement provides for the remedies which AET may pursue by reason of such default. The remedies are spelled out in detail. After specifying these remedies, said section 9.2 provides that AET may enforce its rights in any action or proceeding in equity or at law.

The Agreement contains a broad arbitration clause which covers all disputes under the Agreement, "except as herein provided to the contrary in section 9.2". In other words, the Agreement excludes from arbitration any question of the remedies which may be pursued by AET in the event of petitioner's default, since these remedies are specified at length in section 9.2.

POINT I.

THE PETITION DEMONSTRATES ON ITS FACE
THAT PETITIONER IS NOT ENTITLED
TO A STAY OF ARBITRATION.

The petition, together with its attachments, clearly shows that the dispute between the parties is whether petitioner was in default under the Agreement and that this is an arbitrable issue

Exhibit E

*Memorandum of Respondent Aerlinite Eireann Teoranta
in Opposition to Motion
for Stay of Arbitration and Declaratory Judgment (Excerpts)*

under the Agreement. The petition also shows that the sole subject excluded from arbitration under the Agreement is the question of what remedies AET may pursue in the event of such default, and that AET has not sought any arbitration of that issue (Petition, para. 16).

Under these circumstances, the following language from *Binkow v. Brickman*, 145 N. Y. S. 2d 530 (not officially reported), is equally applicable to the case at bar:

"Since the papers in the present proceeding disclose that there is a dispute, a contract to arbitrate and a refusal to arbitrate, the matters in question are within the exclusive jurisdiction of the arbitrators. In re Crosset, 275 App. Div. 1051, 92 N. Y. S. 2d 109; Matter of Lipman, 289 N. Y. 76, 43 N. E. 2d 817, 142 A. L. R. 1088. Petitioners'

* * *

Exhibit F
Supplemental Memorandum of
Respondent Aerlinite Eireann Teoranta (Excerpts)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 16308/1970

In the Matter of The Application of

TRANS CARIBBEAN AIRWAYS, INC.

Petitioner,

For a Judgment Staying The Arbitration Commenced by
Aerlinite Eireann Teoranta, And For A Declaratory Judgment

vs.

AERLINITE EIREANN TEORANTA AND AMERICAN
ARBITRATION ASSOCIATION, INC.

Respondents.

SUPPLEMENTAL MEMORANDUM OF
RESPONDENT AERLINITE EIREANN TEORANTA

In Point I-A of its reply memorandum, petitioner in fact deals with questions which are not in the way of reply and which should and could have been dealt with in its moving memorandum.

The purpose of this memorandum is to briefly answer the arguments made in said Point I-A.

The thrust of petitioner's argument in Point I-A appears to be that it would be unreasonable and a "misuse of the arbitration process" to expect the arbitrators to determine questions of default without simultaneously therewith determining questions of remedy.

The simple answer to petitioner's argument is that *this is precisely what the parties agreed to.*

Exhibit F to Item 5

Exhibit F
Supplemental Memorandum of
Respondent Aerlinte Eireann Teoranta (Excerpts)

Petitioner is, in effect, seeking the Court's aid in remaking the agreement. This is not the function of the Court on a motion to stay arbitration. The Court's function is to determine whether the parties did or did not agree to arbitrate the issues in question. In this case it is clear that they did. In this connection, it is significant that notwithstanding respondent Aerlinte's submission of evidence as to the intent of the parties (Oppos. Affid. of Leonard H. Steibel November 6, 1970), petitioner has submitted no contrary evidence as to the intent of the parties.

In *River Brand Rice Mills, Inc. v. Latrobe Brewing Co.*, 305 N. Y. 36, the Court of Appeals upheld a decision which had the effect of enforcing a harsh five day contractual time limit for demanding arbitration. In commenting on this five day limitation the Court stated, 305 N. Y. at 42:

"True, arbitration under the agreement may not now be had but the very issue presented in the City Court action was once referable to arbitration and now is no longer so referable only because the parties wrote their own time limitation beyond which no step toward such relief could be taken. *That was within the contract power of the parties.*

In the course of our decisions indicating the purpose and intent of the Legislature in amending the arbitration law from time to time, we have stressed the legislative purpose to strengthen that law *by holding the parties to the terms of their agreement* providing for arbitration of their disputes and to provide an exclusive remedy to prevent departure by either party from such agreement." (Emphasis supplied.)

Exhibit F

Opposing Affidavit of Leonard H. Steibel (Excerpts)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEONARD H. STEIBEL, being duly sworn, deposes and says:

1. I am an attorney at law and member of the firm of Smith and Steibel, attorneys for respondent Aerlinne Eireann Teoranta ("AET"). I submit this affidavit in opposition to petitioner's motion to stay arbitration and for a declaratory judgment.

ARBITRABILITY OF THE DISPUTE

2. The dispute between the parties arises under an agreement of February 8, 1968 which provides, in essence, for petitioner to lease from AET, with option to purchase, two Boeing 747 jet aircraft over a five-year period ("the Agreement"). The petition admits that the Agreement contains an arbitration clause. AET terminated the Agreement September 2, 1970 on the ground that petitioner was in default thereunder. A copy of AET's notice of termination is annexed hereto as Exhibit A. On or about September 4, 1970, petitioner sent a cable to AET in which petitioner acknowledged receipt of said notice and; in the words of the petition, "denied it was in default and confirmed its willingness to perform its obligations under the Agreement" (Petition, para. 11). A copy of said cable is annexed hereto as Exhibit B. Thereupon, after further communications between the parties in which each side reiterated its position (copies of said communication are annexed hereto as Exhibits C-1 through C-4), AET submitted the dispute to arbitration.

Exhibit F to Item 5

Exhibit F

Opposing Affidavit of Leonard H. Steibel (Excerpts)

3. As is clear from the notice of termination and petitioner's response thereto, the dispute between the parties is whether or not petitioner was in default under the Agreement. If petitioner was in default, AET had the right to terminate the Agreement. If petitioner was not in default, AET did not have the right to terminate the Agreement. Section 9.1 of the Agreement, a copy of which section is annexed hereto as Exhibit "D", specifies those acts or omissions of petitioner which constitute an "event of default" under the Agreement. After specifying such "events of default", section 9.1 concludes with the following language:

"then in the happening of any of the foregoing Events of Default AET shall have the remedies set forth in section 9.2."

4. Section 9.2 of the Agreement, a copy of which section is annexed hereto as Exhibit "E", then goes on to provide for AET's remedies where there has been an "event of default." The language of said section 9.2 starts out as follows:

"SECTION 9.2—Remedies

"If one or more events of default enumerated in section 9.1 shall occur, and while such event of default shall be continuing, then in any such event:"

The balance of Section 9.2 then specifies what these remedies are. Included among these remedies are the right to terminate the Agreement (para. "A"). After specifying these remedies, said section 9.2 then provides, at page 9-10 of the Agreement:

"In addition, AET may proceed to protect and enforce its rights by any action, suit or proceedings (in equity or at law) whether for specific performance of any covenants or agreement or in aid of the exercise of any power granted by this Agreement."

Exhibit F to Item 5

Exhibit F

Opposing Affidavit of Leonard H. Steibel (Excerpts)

5. The arbitration clause in the Agreement is contained in section 13.7 thereof, which reads:

"13.7—Arbitration

"Except as herein provided to the contrary in section 9.2, any dispute concerning the validity, interpretation or application of this agreement, or any amendments thereto, or concerning any rights or obligation based on or in relation to such agreement and which cannot be resolved by the parties, hereto, shall be settled by arbitration in New York City in accordance with the rules and regulations of the American Arbitration Association."

6. Thus the pattern of the Agreement, as it relates to this proceeding, is clear. Section 9.1 specifies those acts or omissions which constitute an "event of default" (and in appropriate cases requires notice and an opportunity to cure such default). Section 9.2 is concerned solely with AET's remedies once an "event of default" has occurred. Section 13.7 in effect provides that all disputes under the Agreement (including any dispute as to whether or not there has been an "event of default") are subject to arbitration. The only matter which is not subject to arbitration under the Agreement is the question of what remedies AET may pursue, AET being given the express right under the Agreement to exercise specified remedies in the event of default and, if necessary, to enforce the same in a Court of law.

7. Our office acts as general counsel for AET in North America and represented AET throughout the negotiation and drafting of the Agreement. I personally handled the negotiations and drafting on behalf of our office.

8. As heretofore noted, I believe that the Agreement is clear, unambiguous and unequivocal. Questions of default are covered by Section 9.1 and questions of remedy by Section 9.2. Questions of default are subject to arbitration; questions of remedy are not. In the light of this clear dichotomy be-

Exhibit F

Opposing Affidavit of Leonard H. Steibel (Excerpts)

tween default and remedies, I do not see how petitioner can in good faith assert that the present dispute between the parties, which is limited to questions of default, is not subject to arbitration. However, should the Court determine that there is some ambiguity in the Agreement with respect to this question, then presumably the Court would want to consider parol evidence as to the intent of the parties.

9. The exclusionary language in the arbitration clause was discussed with the petitioner's representatives and counsel during negotiations. At that time we discussed that the effect of this arbitration clause was that all disputes under the Agreement were to be arbitrable, except for our remedies. We made clear to petitioner that the reason for this one exclusion was that once there was a default we wanted to be

* * *

Exhibit F

Opposing Affidavit of Leonard H. Steibel (Excerpts)

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEONARD H. STEIBEL, being duly sworn, deposes and says:

1. I am a member of the firm of Smith & Steibel, attorneys for respondent-respondent Aerlinne Eireann Teoranta, commonly known as Irish International Airlines ("Irish"). I submit this affidavit in opposition to the motion of petitioner-appellant Trans-Caribbean Airways, Inc. ("TCA") to stay the arbitration proceedings between the parties pending hearing and determination of TCA's appeal from a judgment of the Supreme Court denying TCA's motion in that court to stay arbitration.

2. It is Irish's position on this motion that: (a) TCA will not be prejudiced if the arbitration is allowed to proceed notwithstanding the appeal, whereas Irish would

* * *

(a) The agreement is abundantly clear. Questions of default are covered by Section 9.1. Questions of remedy are covered by Section 9.2. The arbitration clause which appears in Section 13.7, is all-inclusive, "except as herein provided to the contrary in Section 9.2." After setting forth Irish's remedies in the event of TCA's default, Section 9.2 states:

"In addition, AET may proceed to protect and enforce its rights by any action, suit or proceedings (in equity or at law) whether for specific performance or any covenants or agreement or in aid of the exercise of any power granted by this Agreement."

Exhibit F to Item 5

Exhibit F

Opposing Affidavit of Leonard H. Steibel (Excerpts)

(b) This the dichotomy in the agreement between questions of default and matters of remedy is clear. Questions of default are covered by Section 9.1 and are subject to arbitration. Irish's remedies in the event of such default are set forth in Section 9.2, and are not subject to arbitration.

(c) On the remote possibility that the court below might nevertheless find some ambiguity in the agreement, we presented parol evidence to the court below (in affidavit form) as to the intention of the parties at the time the agreement was negotiated and executed, indicating that the foregoing dichotomy between default and remedies is precisely what the parties intended and agreed to. TCA had adequate opportunity to submit parol evidence to the contrary and did not do so.

* * *

A 201

Exhibit F

To be argued by
LUDWIG A. SASKOR

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

In The Matter Of The Application of
TRANS CARIBBEAN AIRWAYS, INC.,
Petitioner-Appellant,

For A Judgment Staying The Arbitration Commenced By
Aerlinte Eireann Teoranta, And For A Declaratory Judgment

against

AERLINTE EIREANN TEORANTA and AMERICAN
ARBITRATION ASSOCIATION, INC.,
Respondents-Respondents.

BRIEF OF RESPONDENT-RESPONDENT
AERLINTE EIREANN TEORANTA

SMITH, STEIBEL & ALEXANDER
Attorneys for Respondent-
Respondent Aerlinte
Eireann Teoranta
460 Park Avenue
New York, New York 10022
PLaza 1-2660

LUDWIG A. SASKOR,
GRAHAM E. BARKHAM,
of Counsel.

Exhibit F to Item 5

Exhibit F

* * *

language of Section 9.2 that the court in such a proceeding is to fashion AET's remedies to fit the nature of the default. The court's job is one of "enforcement," not determination.

Even if TCA should convince this Court, or the court in an action brought by AET to enforce its remedies, that there may be a granting of some of the remedies provided in Section 9.2 and a withholding of others, this would not change the basic dichotomy in the Agreement between questions of default, which are covered by Section 9.1 and subject to arbitration, and matters of remedy, which are covered by Section 9.2 and not subject to arbitration.

Thus, in either event, whether AET's remedies are fixed or are subject to court determination, the simple answer to the argument that arbitration of questions of default alone should not be permitted, is that this is precisely what the parties agreed to.

TCA is, in effect, seeking the aid of the courts in remaking the Agreement. This is not the Court's

* * *

A 203

Exhibit G

**Memorandum Opinion of Justice Leff
(see supra at A 89-91)**

Exhibit G to Item 5

Exhibit H

Award of Arbitrators

American Arbitration Association, Administrator
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

AERLINTE EIREANN TEORANTA

and

TRANS CARIBBEAN AIRWAYS, INC.
Case Number: 1310-1038-70

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated February 8, 1968 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

1—There was an event of default on the part of TRANS CARIBBEAN AIRWAYS, INC., hereinafter referred to as RESPONDENT, as of September 2, 1970 (the date of termination by AERLINTE EIREANN TEORANTA, (hereinafter referred to as CLAIMANT) on the grounds of:

- a) RESPONDENT's failure to pay to CLAIMANT the sum of EIGHTY FIVE THOUSAND DOLLARS (\$85,000.00) due, pursuant to the agreement as of July 1, 1969;
- b) RESPONDENT's failure to execute the lease for the initial period;
- c) RESPONDENT's failure to use its best efforts to register the aircraft;
- d) That CLAIMANT followed proper procedure in effectuation of cancellation.

Exhibit H to Item 5

Exhibit H
Award of Arbitrators

2—RESPONDENT's counterclaim is dismissed.

3—The compensation of the Arbitrators for hearings and study time totaling FORTY FOUR THOUSAND TWO HUNDRED FIFTY DOLLARS (\$44,250.00) shall be borne equally by the Parties. Therefore, CLAIMANT shall pay to the American Arbitration Association the sum of ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) for the balance of its portion of compensation still due the Association, and RESPONDENT shall pay to the American Arbitration Association the sum of ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500.00) for the balance of its portion of compensation still due the Association.

4—The Administrative fees and expenses of the American Arbitration Association totaling FOUR THOUSAND FIVE HUNDRED TWENTY FIVE DOLLARS (\$4,525.00), shall be borne equally by the Parties. Therefore, CLAIMANT shall pay to RESPONDENT, the sum of NINE HUNDRED THREE DOLLARS and SEVENTY FIVE CENTS (\$903.75) for that portion of its share of said fees and expenses previously advanced by RESPONDENT to the Association, and CLAIMANT shall also pay to the American Arbitration Association the sum of TWO HUNDRED FORTY SEVEN DOLLARS and FIFTY CENTS (\$247.50) for the balance of its share of said fees and expenses still due the Association.

5—This AWARD is in full settlement of all claims and counter-claims submitted to this Arbitration.

Dated: January 3, 1973

HAROLD C. HARRISON
Harold C. Harrison
FRANK J. AMABILE
Frank J. Amabile
GERARD E. DELANEY
Gerard E. Delaney

Exhibit I

Article from January 22, 1973 Wall Street Journal

Wall Street Journal January 22, 1973 Page 7, Column 2

**IRISH CARRIER TO PRESS FOR \$13 MILLION DAMAGES FROM
AMERICAN AIRLINES**

**Irish International Says It Will Ask Court to Confirm Default
Decision by Arbitration Panel**

By a WALL STREET JOURNAL Staff Reporter

NEW YORK—Irish International Airlines said it plans to move “immediately” to collect \$13 million it claims American Airlines owes it as a result of its victory last week in an arbitration case.

A spokesman for the government-owned Irish carrier said it will file in New York state for court confirmation of the three-man arbitration panel's decision. Earlier, American Airlines had said it will dispute in the courts the right of Irish International to claim damages under the arbitrators' award.

The dispute involves contracts signed in 1968 by Trans Caribbean Airways, subsequently acquired by American Airlines, to lease the two Boeing 747 aircraft in Irish International's fleet during five winter seasons beginning with the winter of 1970-71. Later, American Airlines, in the process of acquiring Trans Caribbean during late 1971, claimed the lease agreements were invalid because, among other things, the Federal Aviation Administration wouldn't permit the foreign-owned planes to be flown in domestic U. S. service under long-standing law.

The lease agreements were terminated and Irish won a New York court ruling that put the dispute to arbitration. After some 30 days of hearings, the panel last week ruled that American Airlines, as successor to Trans Caribbean was in default.

Exhibit I to Item 5

Exhibit 1

Article from January 22, 1973 Wall Street Journal

An official of American Airlines said the arbitrators' ruling applied only to the default issue and not to the award of damages. In any event, he contended, American's maximum exposure would be less than the \$13 million of aggregate rentals that would have been paid under the leases because Irish this winter began using the two planes in regular service.

Michael Dargan, director and chief executive of Irish International, called the decision "a considerable victory for us at the end of a legal struggle which has lasted over two years."

Reply Affidavit of Ludwig A. Saskor

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LUDWIG A. SASKOR, being duly sworn, deposes and says:

1. I am a member of the firm of Smith, Steibel & Alexander, attorneys for defendant. I submit this affidavit in reply to the opposing affidavit of plaintiff's counsel sworn to March 13, 1973.

2. Initially, for the Court's information, the current status of proceedings in the New York Supreme Court is that on March 7, 1973 a decision was issued confirming the arbitration award. A copy of that decision is annexed hereto as Exhibit A. Judgment has not yet been entered on the decision, and plaintiff has moved for reargument.

3. The opposing affidavit is a masterful attempt to create confusion where none exists. This is a wise strategy on plaintiff's part, since in confusion lies plaintiff's only salvation.

REGISTRATION

A. *The Arbitration.*

4. The opposing affidavit suggests that the registration issue was raised in the arbitration solely to show that TCA was not in default in its obligation to use best efforts to register the aircraft, and that TCA's Answering Statement and Counterclaim in the arbitration "were based on the proposition that TCA was not in default." This suggestion is flatly contradicted by TCA's opening brief in the arbitration and the Answering Statement and Counterclaim itself. Although already submitted to the Court in a prior

Reply Affidavit of Ludwig A. Saskor

affidavit, a copy of TCA's Answering Statement and Counterclaim is annexed hereto for the Court's convenience as Exhibit B. Pertinent portions thereof have previously been referred to. For present purposes, it suffices to refer to the following defense asserted therein:

"Additional Defenses

* * *

"7. AET's claims as to defaults are moot since regardless of whether such defaults occurred TCA's obligations under the Agreement and the Agreement itself would have been terminated because the aircraft were not lawfully registrable in the United States."

and to the underscored portion of TCA's counterclaim:

"TCA's Counterclaim for Relief

"10. By reason of AET's conduct as described above, TCA is entitled to a declaration that the Agreement is terminated, that it has no further obligations thereunder, and that it is entitled to a refund of advance payments previously made plus interest, together with such other and further relief as may be appropriate. *In the alternative, TCA is entitled to such a declaration because the aircraft were not lawfully registrable in the United States.*" (Emphasis supplied.)

5. TCA did not assert non-registrability of the aircraft merely as a partial defense, to be considered only if the arbitrators found that TCA was not in default (if they had so found, it is *then* that there would have been no need to consider this defense). Non-registrability of the aircraft was asserted as a complete defense to defendant's claim, as well as one of the two grounds of TCA's Counterclaim. Plaintiff has not shown how the arbitrators could have found for defendant without passing on the foregoing defense; or how the arbitrators could have dismissed TCA's Counterclaim without passing on the foregoing ground of that Counterclaim.

*Reply Affidavit of Ludwig A. Saskor***B. The Agreement.**

6. Wholly apart from the fact that the registration issue was dealt with in the arbitration, it is clear from the face of the agreement (which is incorporated by reference in the amended complaint) that the possibility of the aircraft not being registrable was contemplated by the parties; that both parties assumed certain risks with respect to non-registrability; and that the procedure for dealing with any question of registration was specified in the contract:

(a) The risk assumed by defendant was that if TCA complied with the contract conditions and procedures relating to registration, and notwithstanding such compliance was unable to register the aircraft (and the parties were unable to cure the registration defect within a 30-day period), then if such inability to register the aircraft occurred within the initial lease period the agreement would terminate and TCA would be relieved of its obligations thereunder.

(b) The risk assumed by TCA was that if it failed to comply with the contract conditions and procedures relating to registration, then it was to be held to the agreement notwithstanding any registration problem. So long as TCA complied with all of these conditions and procedures, it was protected against any non-registrability of the aircraft. If it failed to comply with these conditions and procedures, it was not protected.

7. In other words, TCA's right to rely on any alleged non-registrability of the aircraft was limited by—and could only be asserted under and pursuant to—the terms of the agreement. By entering into the agreement containing these express conditions and procedures relating to registration, TCA waived any right to assert non-registrability of the aircraft as a basis for relieving itself of its obligations under the agreement (or as a basis for precluding defendant from exercising its contractual remedies thereunder) except in the manner prescribed thereunder and upon compliance with the conditions contained therein.

Reply Affidavit of Ludwig A. Saskor

8. The allegations of the amended complaint show that TCA did not follow the procedures prescribed by the agreement for dealing with registration and did not comply with the contract conditions relating thereto (in addition to the finding in the arbitration award—a part of the complaint—that TCA was in default in failing to use best efforts to register the aircraft, the arbitration award also found that TCA was in default in failing to execute the lease for the Initial Period; it is only where TCA's inability to register the aircraft occurs under the lease for the Initial Period that the agreement comes to an end and TCA is relieved of its obligations thereunder). The allegations of the amended complaint also show that plaintiff, as TCA's successor, is not asserting non-registrability of the aircraft pursuant to the agreement but rather is attacking registration outside the terms of the agreement.

C. State Court.

9. In addition to raising the registration issue in arbitration, plaintiff has also sought to raise the registration issue in its application for reargument of the applications in the New York Supreme Court to confirm and vacate the arbitration award. A copy of plaintiff's motion for reargument (excluding exhibits) is annexed hereto as Exhibit C.

D. Substantive Issues.

10. While plaintiff contends that the Court cannot consider this motion as one for summary judgment, nevertheless the opposing affidavit deals extensively with the merits of plaintiff's action. Insofar as the opposing affidavit deals with the merits of the registration question, there is annexed hereto as Exhibit D an excerpt from an affidavit of March 20, 1973 which defendant submitted in the New York Supreme Court proceeding in opposition to plaintiff's motion for reargument of the applications to confirm and vacate the arbitration award. The excerpted portion of the affidavit relates to the merits of the registration issue

Reply Affidavit of Ludwig A. Saskor

which, as noted, plaintiff has also sought to raise in the New York Supreme Court.

11. To highlight and summarize some of the points made in the foregoing affidavit: (a) registrability of the aircraft was supported by long-standing practice of the FAA and its predecessor agency to treat *all* leases with options to purchase as conditional sales contracts under the Federal Aviation Act and to register the aircraft under such leases in the name of the lessee; (b) prior opinions of the FAA interpreting the registration requirements of the Federal Aviation Act support registrability of the Irish aircraft under the agreement; (c) there have been a number of prior leases between defendant and U. S. carriers, and the FAA has always accepted those leases as a basis for registering the aircraft in the name of the U. S. lessee; (d) two of these prior leases which were accepted by the FAA were leases between defendant and TCA; (e) the FAA opinion of November 3, 1970 was the culmination of efforts by defendant and TCA to get out of the agreement (while the agreement was extremely beneficial to TCA, plaintiff as TCA's merger partner was already saddled with surplus aircraft in a period of industry decline, and had no use for the Irish aircraft); (f) these efforts included a visit by plaintiff's officials to defendant in July 1970, where plaintiff threatened to try to raise a registration issue with the FAA unless defendant consented to a 75% reduction in the term of the agreement; the summary rejection of defendant's offer to reduce the option price; misrepresenting the facts to the FAA and otherwise drafting the request for an opinion in such a way as to invite an adverse opinion on registration; and having the request for the FAA opinion hand delivered by plaintiff's counsel, who told the FAA of his own opinion that the aircraft were not registrable and pressed a copy of his written opinion of non-registrability on the FAA but failed to advise the FAA of the contrary opinion of defendant's aviation counsel; (g) the FAA opinion was requested from the FAA in Washington just a few weeks after FAA Counsel at the FAA Aircraft Registry in Oklahoma City (which is the department of the FAA which

Reply Affidavit of Ludwig A. Saskor

registers aircraft and which normally deals with questions of registration) had examined the agreement and lease form and given a verbal opinion that the aircraft *were* registrable; TCA's chief expert witness in the arbitration admitted that the aircraft probably would have been registered if the agreement and lease form had simply been presented to the FAA in the normal course of business, together with an application for registration in TCA's name.

TERMINATION

12. In support of several causes of action in the amended complaint, the opposing affidavit asserts the following syllogism: (a) since the aircraft were not registrable, the agreement by its terms "would have come to an end" and defendant would not have been able to collect any rents thereunder; (b) as part of its remedies defendant is seeking to collect the rents as they fall due; (c) if defendant were permitted to enforce this remedy, it would thereby be placed in a better position by virtue of having terminated the agreement than it would have been in if it had not terminated the agreement.

13. The defect in the foregoing syllogism is that it proceeds from a faulty premise. The agreement was to come to an end, and TCA relieved of its obligations thereunder, only if inability to register the aircraft occurred *notwithstanding TCA's best efforts*. The arbitration award expressly found that TCA did not exercise best efforts to register the aircraft. Therefore, the agreement would not have "come to an end," and TCA would not have been relieved of its obligations thereunder. Having failed to use best efforts to register the aircraft, TCA would be held to the terms of the agreement notwithstanding any inability to register the aircraft (in addition, as heretofore noted, the arbitration award found that TCA was in default in failing to execute the lease for the Initial Period, and it is only where TCA's inability to register the aircraft occurs under the Initial Period lease that the Agreement comes to an end and TCA is relieved of its obligations).

Reply Affidavit of Ludwig A. Saskor

IMPOSSIBILITY OF PERFORMANCE

14. Plaintiff also appears to contend that in view of the alleged non-registrability of the aircraft and the public policy considerations underlying that non-registrability, it would be unlawful and against public policy to permit plaintiff to recover indirectly, by exercise of its contractual remedies, rents under an agreement which contemplates the operation of foreign aircraft in U. S. commerce.

15. The foregoing argument ignores the provisions of the agreement. Nothing in the agreement requires TCA to operate the aircraft, in the United States or anywhere else. The "performance" required of TCA is the payment of rent. There is nothing illegal or against public policy in the payment of rent. There was nothing to prevent TCA from paying the rent and letting the aircraft sit on the ground. Moreover, TCA had a right of sublease under the agreement (although the right of sublease related to domestic carriers, the official who negotiated and executed the agreement on behalf of defendant testified in the arbitration that defendant would have consented to a sublease to a foreign carrier). TCA assumed the risk of non-registrability (and was protected against non-registrability if it followed the contract procedures and complied with the contract conditions), just as it had done in the two prior lease transactions with defendant, where the FAA had registered the aircraft.

ATTACK ON CONTRACTUAL REMEDIES

A. *The Agreement.*

16. In contending that it is free to attack defendant's right to exercise its contractual remedies, plaintiff is again ignoring the agreement. Defendant's remedies upon the occurrence of an event of default (as defined under Section 9.1 of the Agreement) were agreed to in advance by TCA at the time it entered into the agreement. Similarly, the defaults which would give rise to such remedies (defined in the agreement as "events of default") were agreed to by TCA at the time it entered into the

Reply Affidavit of Ludwig A. Saskor

agreement. Any claim that the remedies were too harsh, or that the defaults giving rise to such remedies were too small, should have been made when the agreement was negotiated. The agreement is clear and unequivocal. An event of default triggers specified remedies. It is too late in the day to redraft the agreement.

B. Waiver.

17. The question raised by plaintiff's post-arbitration attack on defendant's remedies is not whether TCA should have raised these objections in the arbitration (in fact it did so to a certain extent). It is whether TCA should have raised these objections *prior* to the arbitration, on its motion to stay arbitration. This question has nothing to do with whether or not the remedies are subject to arbitration.

18. In asserting that TCA was not required to raise these objections on the motion to stay arbitration, plaintiff is suggesting that TCA was free to sit back and allow the matter to proceed to an arbitration which lasted some seven months and entailed enormous expense and then, depending on the outcome of the arbitration, either accept the arbitration award or go into Court and seek in effect to nullify the award on a ground which was available to it when defendant first demanded arbitration. To state this proposition is to answer it. If notwithstanding the arbitrators' finding of default defendant is precluded from exercising the remedies prescribed under the agreement where such default has occurred, what was the point of the arbitration? Whether plaintiff is or is not in terms attacking the arbitration award, the effect of what it seeks in this declaratory judgment action is to nullify the arbitration award (as made clear by the original complaint, which by its terms seeks to prevent "enforcement of the arbitrators' award"). It is submitted that however labelled, any defense which if upheld would have the practical effect of nullifying an arbitration award is a defense which must be asserted if at all at the outset of the arbitration.

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C. Effect of State Court Decision.

19. It is true that on the motion to stay arbitration defendant took the position, and the New York Supreme Court agreed, that defendant's remedies under the agreement were not subject to arbitration. However, the basis of that position was that the remedies which follow upon an event of default had been agreed to in advance and were spelled out in the agreement, and therefore once there is a finding of an event of default *there can be no dispute as to defendant's remedies.*

20. The affidavit and memorandum referred to at Exhibits D and E of the opposing affidavit were submitted on plaintiff's first motion for a stay of arbitration, which was decided on a narrow procedural ground by a different Judge than the one who decided the second motion. However, the observations set forth below with respect to the second motion apply equally to defendant's papers on the first motion.

21. As to those papers excerpted at Exhibit F to the opposing affidavit, it suffices to annex hereto as Exhibit E the first five pages (as opposed to the first *four* pages submitted by plaintiff) of the first Steibel affidavit, and to refer to the following statements therefrom:

"7. Our office acts as general counsel for AET in North America and represented AET throughout the negotiation and drafting on behalf of our office.

* * *

"9. The exclusionary language in the arbitration clause was discussed with the petitioner's representatives and counsel during the negotiations. At that time we discussed that the effect of this arbitration clause was that all disputes under the Agreement were to be arbitrable, except for our remedies. We made clear to petitioner that *the reason for this one exclusion* was that once there was a default we wanted to be able to invoke our remedies immediately and *we did not want there to*

Reply Affidavit of Ludwig A. Saskor

be any question about our remedies. Petitioner understood this and did not object thereto.

"10. The foregoing arbitration clause is sensible and reasonable. There may possibly be a bona fide dispute between the parties as to whether an 'event of default' has occurred (though I do not believe there is any genuine dispute in this case). If so, this is a matter which is amenable to arbitration. However, once it has been determined that an 'event of default' has occurred, there is no reason why the remedies which may be pursued on account of such default—which remedies are clearly spelled out in the Agreement—need be submitted to arbitration." (Emphasis supplied.)

22. No contrary evidence was presented to the New York Supreme Court regarding the actual intention of the parties. That the Court accepted defendant's interpretation of the agreement is evident from its discussion of the contract language which preceded the statement on which plaintiff now seeks to rely:

"Section 9.1 of the agreement specifies those acts of petitioner which constitute an 'event of default'. After specifying such 'events of default', section 9.1 concludes with the following language:

'Then in the happening of any of the foregoing Events of Default AET *shall have* the remedies set forth in Section 9.2.'

"Section 9.2 of the agreement then goes on to provide for AET's remedies where there has been an 'event of default'.

"The language of said Section 9.2 begins:

'If one or more events of default enumerated in Section 9.1 shall occur, and which [sic] such event of default shall be continuing, then in any such event:'

Reply Affidavit of Ludwig A. Saskor

The balance of Section 9.2 then *specifies what these remedies are, among which is included the right to terminate the agreement.*

"After specifying these remedies, Section 9.2 then states, at pages 9 and 10 of the agreement:

'In addition AET may proceed to protect and *enforce* its rights by any action, suit or proceeding (in equity or in law) whether for specific performance of any covenants or agreement or in aid of the exercise of any power granted by this agreement.'

* * *

"The only matter which is not subject to arbitration under the agreement is the question of what remedies AET may pursue, *AET being given the express rights under the agreement to exercise specified remedies in the event of default and, if necessary, to enforce same in a court of law.*" (Emphasis supplied.)

23. In attempting to read a different meaning into the New York Supreme Court's statement, and into the agreement itself, plaintiff apparently translates the word "enforce" to mean "determine," or "litigate." There is nothing in the agreement or in the New York Supreme Court decision to support this strained interpretation. The pattern and language of the agreement, and the Court's extended discussion thereof, leave no doubt that the word "enforce" was being used in its ordinary sense and meaning (although the very fact that this Court is now being called upon to construe a decision in the New York Supreme Court proceeding is an indication as to why the issues sought to be raised in this action should properly be determined, if at all, in that Court and that proceeding).

24. Plaintiff's present interpretation of the position taken by defendant on the motion to stay arbitration is strangely at odds with the manner in which plaintiff interpreted that position at the time. Annexed hereto as Exhibit F is a copy of an affidavit

Reply Affidavit of Ludwig A. Saskor

of the same plaintiff's counsel who made the opposing affidavit on the present motion. In his earlier affidavit, plaintiff's counsel interpreted defendant's position as follows:

"The crux of that position is that the arbitrators are not permitted, *and the courts not required*, to deal with remedies, *since the remedies in Section 9.2 of the Agreement are automatic once there has been a default. A finding as to default is therefore said to resolve the controversy.*" (Emphasis supplied.)

ENFORCEABILITY OF REMEDIES

25. Plaintiff's claim that defendant's contractual remedies under the agreement are "penal" provisions, and unenforceable under New York law, as that claim is contained in the fifth cause of action of the amended complaint, is disposed of by the terms of the agreement which forms a part of that complaint. Under Section 9.2, Paragraph F, where defendant relets the aircraft TCA is entitled to a pro rata credit against rentals (subject to adjustment for defendant's expenses in reletting). Where defendant uses the aircraft itself, TCA is entitled to a pro rata credit of 50% against rentals. True, the 50% figure applies even if defendant's profit on such use is more than that. It also applies if defendant's profit is less than that. It applies even if defendant incurs a loss on such use. It applies across the board. The situation where defendant uses the aircraft on its own routes is a classic example of agreement on a fixed sum where damages are difficult to measure. There could be endless dispute as to the proper method of measuring defendant's profit or loss on the particular use of a particular aircraft. Under Paragraph G of Section 9.2, defendant may elect to recover, on a discounted basis, the excess, if any, of the remaining rentals over the fair and reasonable net rental value of the aircraft for the balance of the term.

26. It is clear from the face of the agreement, which is a part of the amended complaint, that there is nothing penal about the foregoing remedies.

Reply Affidavit of Ludwig A. Saskor

WHEREFORE, it is respectfully requested that the amended complaint be dismissed, with costs, and without leave to serve a further amended complaint.

LUDWIG A. SASKOR
Ludwig A. Saskor

(Sworn to by Ludwig A. Saskor on March 23, 1973.)

Exhibit A

Memorandum Decision of Justice Chimera

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM—PART I

NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street,
New York, New York 10007.

PRESENT: HON. THOMAS C. CHIMERA, Justice.

In the matter of the application of

TRANS CARIBBEAN AIRWAYS INC.

against

AERLINTE EIREANN TEORANTA

et al.

The following papers numbered 1 to 8 read on this motion,
Submitted by Court No. 142 on Calendar of Jan. 24, 1973.

**PAPERS
NUMBERED**

| | |
|--|-----|
| Filed—Order to Show Cause—and Affidavits | |
| Annexed exhibit | 1-3 |
| Answering Affidavit and exhibits | 5-8 |
| Affidavit of Service | 4 |

Upon the foregoing papers this application to confirm the award of the arbitrator is granted. Errors, mistakes or defections from strict legal rules are all included in the arbitration risk (Matter of Wilkens, 169 N. Y. 494; Shirley Silk Co. v. American Silk Co., 257 App. Div. 375; Matter of Mutton Wiener Co., 2 AD 2d 341; Matter of Schine, 26 NY 2d 799). In exchange for

Exhibit A to Item 6

Exhibit A

Memorandum Decision of Justice Chimera

speed and finality, the parties to arbitration surrender the safeguards which surround a conventional trial (*Mole v. Queens Ins. Co.*, 14 AD 2d 1, 3). The fact that the arbitrators may have misconstrued the provisions of the contract or not properly applied legal rules is not a bar to confirmation of an award. Settle judgment.

Dated March 7, 1973

THOMAS C. CHIMERA
J. S. C.

County Clerk's No. 16308, 1970
Spec I Liber T7 Line 2, 1973

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Exhibit B

Answering Statement (see supra at A 110-14)

Exhibit B to Item 6

Exhibit C

**Order to Show Cause and Affidavit in Support of
Motion for Reconsideration or Clarification**

At a Special Term, Part II of the Supreme Court of
the State of New York, County of New York,
held at the Courthouse, 60 Centre Street, New
York, New York on the 9th day of March, 1973.

PRESENT: HON. WILFRED A. WALTEMADE, Justice.

Index No. 16308/1970

In the Matter of the Application of

TRANS CARIBBEAN AIRWAYS, INC.,

Petitioner,

For a Judgment Staying the Arbitration Commenced by
Aerlinte Eireann Teoranta, And for a Declaratory Judgment

against

AERLINTE EIREANN TEORANTA and AMERICAN
ARBITRATION ASSOCIATION, INC.,

Respondents.

Upon reading and filing the annexed affidavit of Andrew C. Hartzell, Jr., sworn to the 8th day of March, 1973, and upon all of the papers and proceedings had herein, let the respondent Aerlinte Eireann Teoranta ("AET") show cause at a Special Term, Part I, of this Court at the Courthouse, 60 Centre Street, New York, New York on the 14th day of March, 1973 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made granting petitioner's application for reconsideration of AET's motion to confirm an arbitration award dated January 3, 1973, or in the alternative, for clarification of the decision of Justice Chimera dated March 7, 1973, upon said motion to confirm, and

Exhibit C to Item 6

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Exhibit C

*Order to Show Cause and Affidavit in Support of
Motion for Reconsideration or Clarification*

WHY, pending the determination of petitioner's application herein, settlement and entry of judgment upon the aforesaid decision of Justice Chimera should not be stayed; and it is further

ORDERED that, sufficient reason appearing therefor, service of a copy of this order together with the papers on which it is granted upon AET's attorneys on the 9th day of March, 1973 shall be deemed sufficient.

Enter:

W A W
J. S. C.

Exhibit C to Item 6

Exhibit C

**Affidavit in Support of Motion for
Reconsideration or for Clarification**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANDREW C. HARTZELL, JR., having been duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Debevoise, Plimpton, Lyons & Gates, attorneys for American Airlines, Inc. ("American"), successor in interest to Trans Caribbean Airways, Inc. ("TCA"). This affidavit is made in support of American's motion for reconsideration of the motion by Aerlinte Eireann Teoranta ("AET") to confirm an arbitration award dated January 3, 1973, or, in the alternative, for clarification of this Court's decision, dated March 7, 1973, granting AET's motion to confirm.

APPROPRIATENESS OF THE INSTANT MOTION

2. On January 19, 1973 AET moved to confirm the arbitration award. That award purported to do no more than to find, in effect, that TCA was in default under a certain Agreement and to hold that TCA's request for a refund of its downpayments was denied. Specifically, the award was totally silent with respect to the question of whether the AET aircraft could be registered with the Federal Aviation Administration ("FAA") in TCA's name pursuant to Section 501 of the Federal Aviation Act, 49 U. S. C. § 1401, and applicable FAA regulations. Such a determination was not necessary to the arbitrators' award. Consequently, in opposing AET's motion to confirm, American did not speak to this issue.

Exhibit C to Item 6

Exhibit C

*Affidavit in Support of Motion for
Reconsideration or for Clarification*

3. On February 9, 1973 AET moved to dismiss a federal action commenced by American in the Southern District of New York. In the federal action, American seeks a declaratory judgment that, regardless of the arbitration award, AET is not entitled to any remedies under the Agreement.* AET's motion to dismiss the federal action asserted, among other things, that the arbitration award constituted a determination that the foreign-owned aircraft involved under the Agreement could be registered with the FAA in TCA's name.

4. In an attempt to resolve this question, American filed a supplemental affidavit in these proceedings on February 13, 1973. Although denying that the award had made any such determination, American pointed out that AET had taken a contrary position which further demonstrated the necessity for vacating the award.

5. AET objected to the filing of the supplemental affidavit, asserting that it should not be considered because it was not timely. The Court's decision affirming the award does not mention the supplemental affidavit or the issues raised therein; and American does not know whether they were considered by the Court in reaching its decision. (The memorandum decision by the Court is attached hereto as Exhibit A.)

6. American respectfully submits that the matters which were raised in the supplemental affidavit, and which are re-

* The Agreement which was the subject of the arbitration expressly excluded the question of AET's remedies from the scope of arbitration, even though it permitted AET to arbitrate questions relating to TCA's alleged defaults. Thus, once TCA's defaults were determined in the arbitration proceeding, the issue of AET's remedies (if any) was left for subsequent court adjudication. That this bifurcated procedure exists was admitted by AET and was confirmed by the ruling of Mr. Justice James J. Leff in his decision, dated December 7, 1970, in this proceeding.

Exhibit C
Affidavit in Support of Motion for
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peated below, were asserted in a timely fashion and require vacatur of the award. American did not know until a few days prior to the filing of the supplemental affidavit that AET would assert a construction of the arbitration award which was totally unjustified. AET's original papers in support of its motion to confirm did not mention this issue. Since the arbitration award did not purport to speak to the issue, American could not have brought the matter to the Court's attention any sooner than it did. The position taken by AET with respect to the registration question further demonstrates why the award should not be confirmed, and hence American asks that the Court reconsider AET's motion to confirm. In the alternative, American requests that the Court clarify its decision to delineate what has or has not been decided.*

7. This motion is brought on by order to show cause rather than by notice of motion because American has requested a stay of the entry of judgment pending a determination of this motion.

8. Except as stated above, no prior request for this or similar relief has been made by American.

AN AWARD CANNOT BE CONTRARY TO
 PUBLIC POLICY AND FEDERAL LAW

9. It has long been held that confirmation of an award should be denied pursuant to the Court's general equity powers where an award is contrary to the public policy of the state or of the United States. See, e.g., *Western Union Tel. Co. v. American Communications Ass'n*, 299 N. Y. 177, 185-87 (1949). If the

* In another AET affidavit in the Federal action, dated February 28, 1973, it claimed that the arbitrators decided that AET had a right to terminate. This also is erroneous; the question of AET's remedies was expressly excluded from arbitration. AET's new argument further demonstrates the need for vacatur or clarification of the award.

*Exhibit C**Affidavit in Support of Motion for
Reconsideration or for Clarification*

instant arbitration award were held to constitute a determination that the foreign-owned aircraft could be lawfully registered in the United States, or that remedies could be awarded on such an assumption, the award would plainly violate the Federal Aviation Act and the public policy of this country.

10. Section 501 of the Federal Aviation Act makes it unlawful to operate an aircraft in the United States unless it is registered by the owner. Furthermore, the Act requires that the owner be a citizen of the United States. A basic part of the legislative policy behind the registration requirement is known as the principle of "cabotage". It originated in maritime law and, simply stated, is that foreign-owned aircraft cannot fly between "capas" or points in the same country and cannot compete in domestic air traffic with aircraft owned by United States citizens. The same principle underlies Section 1108 of the Federal Aviation Act, 15 U. S. C. § 1508. See *Petition of Qantas*, 29 Civil Aeronautics Board Reports 33 (1959); Kingsley, *Nationality of Aircraft*, 3 Journal of Air Law and Commerce 50, 51 (1932); Convention on International Civil Aviation (Chicago Convention), December 7, 1944, Art. 7, 61 Stat. 1182. Compare the similar maritime policy discussed in *Central Vermont Transportation Co. v. Durning*, 294 U. S. 33, 41 (1935), and in *Marine Carriers Corp. v. Fowler*, 429 F. 2d 702 (2d Cir. 1970). So important is this policy that the FAA regulations provide that

"... the registration of an aircraft is invalid if, at the time it is made... the applicant is a citizen of the United States, but his interest in the aircraft was created by a transaction that was not entered into in good faith and was made to avoid... compliance with section 501 of the Federal Aviation Act... that prevents registration of an aircraft owned by a person who is not a citizen of the United States." C. F. R. § 47.43(a)(4). (Emphasis added.)

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11. An "owner" for purposes of registration under the Federal Aviation Act includes one who is purchasing the aircraft under a contract of conditional sale, or a lessee under a lease which is equivalent to a contract of conditional sale. 14 C. F. R. § 47.5(c). The following points were undisputed in the arbitration:

(a) The Agreement, as well as each seasonal lease, gave TCA an option to purchase the aircraft but at a price 115% of a new Boeing plane (*i.e.*, at a premium of almost \$4 million from the outset).

(b) The value of the plane to be purchased was determined on the basis of a new and different aircraft, not the aircraft to be purchased; as a result, the price increased each year even though the plane to be purchased grew older.

(c) The rentals to be paid by TCA were not credited to the option price if the option was exercised.

(d) The option was inserted in the Agreement not because either party expected TCA to exercise the option but rather because it was hoped that the option would facilitate registration.

(e) The seasonal nature of the leases did not conform to the ordinary conditional sale under which the vendee acquires complete possession of the item being sought.

In short, it was clear that TCA was not the owner and was not acquiring the aircraft under a conditional sales contract. Consequently, the aircraft could not have been registered under any circumstances. The subject was squarely dealt with in an opinion which the FAA rendered in November 1970 and which was introduced at the hearing. That opinion, a copy of which is attached hereto as Exhibit B, held that TCA was not the owner or conditional vendee of the planes and hence could not lawfully register the aircraft.

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12. The evidence on the subject of registration, as on many other points in the arbitration, was presented to show that TCA (and American) had a legitimate problem with the aircraft and that TCA was not failing in its best-efforts obligation with respect to registration. The arbitrators decided that TCA was, on September 2, 1970, failing in its best-efforts obligation in connection with registration. Hence, they never reached the question whether, if best efforts had been used then or later, the aircraft could have been lawfully registered. If they had so ruled, such a determination would have been in violation of law and public policy, outside the scope of their authority, and in manifest disregard of the opinion of the FAA. Neither arbitrators nor courts can disregard opinions of federal administrative agencies primarily charged with enforcement of regulatory statutes. See *Ricci v. Chicago Mercantile Exchange*, 41 U. S. L. W. 4097 (U. S. Supreme Court 1/9/73).

THE AWARD DOES NOT DEAL WITH REGISTRATION

13. It is plain from an examination of the arbitration award that it does not deal with the question of registration of aircraft. Nor does it deal with what remedies, if any, including damages, AET might be entitled to recover under the Agreement, or what defenses to such recovery American, as successor to TCA, is entitled to raise. These matters were expressly excluded from the scope of the arbitration, as recognized in Justice Leff's opinion of December 7, 1970, herein. Justice Leff ordered that arbitration was appropriate on matters of default, but not on matters of remedies. Therefore, it would be contrary to the basis on which the arbitration proceeded to attempt to read into the award any determination on issues of registration, especially in the context of damages and other remedies.

14. Not only does the arbitration award make no reference to registration, but it was entirely unnecessary for the arbitrators

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to decide the issue. Furthermore, registration is a matter of major federal policy, embodied in federal statutory law, and could not be decided by arbitrators even if the matter had been presented to them for decision, which it was not:

"We have often held that the broadest of arbitration agreements cannot oust our courts from their role in the enforcement of major State policies, especially those embodied in statutory form (*Durst v. Abrash*, 22 AD 2d 39, affd. 17 NY 2d 445, *supra* [usury laws]; *Matter of Knickerbocker Agency [Holz]*, 4 NY 2d 245 [liquidation of defunct insurance companies]; *Matter of Kingswood Mgt. Corp. [Salzman]*, 272 App. Div. 328 [claim under Federal Emergency Price Control Act of 1942]; see, also, *Wilko v. Swan*, 346 U. S. 427, *supra* [claim under Securities Act of 1933]; *Koven & Brother v. Local Union No. 5767, United Steelworkers of America*, 381 P. 2d 196 [3d Cir.] [scope of discharge in bankruptcy]; contra, *Fallick v. Kehr*, 369 F. 2d 899 [2d Cir.] [scope of discharge in bankruptcy]; 8 Weinstein-Korn-Miller, N. Y. Civ. Prac., pars. 7501.15-7501.19). Recently, the Second Circuit in *American Safety Equip. Corp. v. Maguire Co.* (391 F. 2d 821) came to a conclusion similar to ours involving arbitration of a Federal antitrust claim (see, also, *Silvercup Bakers v. Fink Baking Corp.*, 273 F. Supp. 159, 162-163 [S. D. N. Y.] [dictum])." *Matter of Aimcee Wholesale Corp.*, 21 N. Y. 2d 621, 629-30 (1968).

IF THE ARBITRATORS' AWARD IS UNCLEAR,
 IT SHOULD FOR THAT REASON BE VACATED

15. CPLR 7511(b)(iii) provides that an award shall be vacated if the court finds that

"... an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a

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final and definite award upon the subject matter submitted was not made. . . ."

If, as AET claims, the arbitration award constituted a determination as to registrability of the aircraft, such a determination was contrary to federal law and public policy, and therefore exceeded the scope of the arbitrators' power. For that reason it should be vacated. If the arbitration award constituted a determination as to matters such as registrability relating to remedies or damages, it also exceeded the power of the arbitrators as stated in Justice Leff's opinion referred to above. For that reason also it should be vacated. If it is unclear whether the arbitration award constituted a determination on these matters, it should be vacated because it was so "imperfectly executed . . . that a final and definite award" was not made. The only alternative method of resolving such indefiniteness as to the award would be a full hearing to review the arbitration proceedings in order that an informed determination can be made as to the meaning of the award. See *Sobel v. Hertz, Warner & Co.*, N. Y. L. J. (12/20/72), page 1 (2d Cir. 1972). Vacatur of the award is obviously a more practical method to the same end in view of the extensive record in this proceeding.

16. Even if the Court were to confirm the award, as we submit it should not, it is essential that the ruling on confirmation delineate the meaning of the award so that all parties will know what the Court has confirmed.

WHEREFORE, it is respectfully submitted, for the reasons stated in this affidavit and for the reasons previously stated in my affidavit, sworn to January 26, 1973, that the award herein be vacated or, in the alternative, that this Court's decision, dated March 7, 1973, be clarified.

ANDREW C. HARTZELL, JR.
Andrew C. Hartzell, Jr.

(Sworn to by Andrew C. Hartzell, Jr. on March 8, 1973.)

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Exhibit D

Opposing Affidavit of Ludwig A. Saskor (Excerpts)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 16308/1970

In The Matter of The Application of

TRANS CARIBBEAN AIRWAYS, INC.,

Petitioner,

**For a Judgment Staying The Arbitration Commenced by
Aerlinte Eireann Teoranta, And For A Declaratory Judgment**

against

**AERLINTE EIREANN TEORANTA AND AMERICAN
ARBITRATION ASSOCIATION, INC..**

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LUDWIG A. SASKOR, being duly sworn, deposes and says:

1. I am a member of the firm of Smith, Steibel & Alexander, attorneys for respondent Aerlinte Eireann Teoranta ("Irish"). I submit this affidavit in opposition to petitioner's motion for reargument.

2. Petitioner's application is framed in terms of a request for "reconsideration" of Irish's motion to confirm the arbitration award, or alternatively for "clarification" of the decision granting said motion. It is in effect a motion for reargument and the principles applicable to such motions are applicable here.

3. The grounds of petitioner's application are as unclear as petitioner claims this Court's decision to be.

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Opposing Affidavit of Ludwig A. Saskor (Excerpts)

THE EVIDENCE BEFORE THE ARBITRATORS ESTABLISHED
THE REGISTRABILITY OF THE AIRCRAFT

26. Petitioner's position in the arbitration that the aircraft were not registrable was based primarily on the testimony of Preston G. Gaddis, II, an Oklahoma City attorney who works on aircraft registration matters (the FAA Aircraft Registry is located in Oklahoma City) and who had requested the FAA opinion. Mr. Gaddis was on the witness stand for six days. He testified on direct examination that in his opinion the aircraft were not registrable. However, on cross examination and on examination by the arbitrators the following facts were developed, among others:

(a) The question of whether or not the aircraft were registrable in petitioner's name was dependent in part on whether or not the agreement or the leases to be entered into thereunder constituted "conditional sales contracts" within the meaning of the Federal Aviation Act ("the Act") and FAA regulations. The Act defines a conditional sales contract as including a lease which contains an option to purchase the aircraft at a price substantially equivalent to the value thereof. The leases to be executed under the agreement were leases with options to purchase and thus literally complied with the requirements of the Federal Aviation Act and FAA regulations. It was Mr. Gaddis' position that notwithstanding this literal compliance with the statute and regulations, the agreement and leases thereunder did not constitute conditional sales contracts for purposes of registration. However, in a written opinion rendered by Mr. Gaddis shortly before the FAA opinion was requested, Mr. Gaddis made the following statement:

"One additional area of consideration is the possible existence of a present or long-standing policy of the Administration which is contrary to our opinion expressed above. * * * The Administration has, as a matter of practice, generally treated *all* leases containing options

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Opposing Affidavit of Ludwig A. Saskor (Excerpts)

to purchase as conditional sales contracts where they are filed with the Administration without any prior or accompanying request that a formal determination be made as to their legal effect." (Emphasis supplied.)

On cross examination Mr. Gaddis admitted that the foregoing practice of the FAA in treating *all* leases with options to purchase as conditional sales contracts (regardless of the option price) had existed for as long as he had been practicing before the FAA.

(b) Mr. Gaddis admitted that there were no judicial decisions interpreting the term conditional sales contract under the Federal Aviation Act, and that the legislative history of the Act gave no indication as to the meaning of this term.

(c) Mr. Gaddis admitted that if the agreement had simply been presented to the FAA in the normal course of business, together with an application for registration in petitioner's name as lessee, the FAA probably would have accepted the registration in petitioner's name.

(d) Mr. Gaddis admitted that under his view of what did or did not constitute a valid registration under the Federal Aviation Act, there were many aircraft flying around with supposedly invalid registrations, and that he and his firm had in fact handled some of these supposedly invalid registrations knowing them to be invalid.

(e) Mr. Gaddis admitted that although the FAA was aware of these numerous "invalid" registrations, he did not know of a single instance where the FAA had cancelled a registration because of such alleged invalidity.

(f) Mr. Gaddis' interpretation of a conditional sales contract as that term is used in the Act was that the option price had to be merely a nominal sum, and that any lease containing an option to purchase an aircraft for more than a nominal sum did

*Exhibit D**Opposing Affidavit of Ludwig A. Saskor (Excerpts)*

not qualify as a conditional sale within the meaning of the Act, even if the option price and rentals taken together were equal to—or less than—the actual value of the aircraft. Thus under Mr. Gaddis' interpretation of the Act, the Irish—TCA leases would not have qualified as conditional sales contracts thereunder even if the option (which was exercisable even when one of the aircraft was brand new and the other only a few months old) was to purchase the aircraft at 50% of the price of a new aircraft.

(g) Among the supposedly "invalid" registrations which had been handled by Mr. Gaddis and/or his firm, was a prior lease transaction between Irish and another U.S. airline which contained an option to purchase the aircraft at a price substantially in excess of the actual value of the aircraft. Mr. Gaddis testified that he had personally handled this registration and that in his opinion the registration was invalid.

27. One of petitioner's arguments in the arbitration, and its moving affidavit herein, as to why the Irish—TCA agreement and the leases thereunder did not qualify as conditional sales contracts under the Act, was that the option to purchase the aircraft was at 115% of the price of a new aircraft (at the beginning of the term of the agreement one of the aircraft would be brand new when first leased to petitioner, and the other only a few months old). At the time the agreement was negotiated and entered into, the Boeing 747 jumbo jet aircraft to be leased under the agreement was being heralded as a plane that would change the economics of the airline industry. Forecasts were that it would be extremely successful, and orders for the plane (which was not yet in service) were so heavy that the lead time for delivery from the manufacturer was several years.

28. Petitioner also notes in its moving affidavit that the percentage difference between the option price and the actual value of the aircraft increased as the term of the agreement went on. This same argument was made in the arbitration. However, Irish introduced into evidence other leases with options to pur-

*Exhibit D**Opposing Affidavit of Ludwig A. Saskor (Excerpts)*

chase where the discrepancy between the actual value of the aircraft and the option price was far in excess of the percentage difference in the case of the Irish—TCA agreement even at the end of the agreement term. These percentages ranged as high as 370%. All of these leases had been accepted by the FAA as a basis for registering the aircraft in the name of the lessee.

29. All of the foregoing prior leases which had been accepted by the FAA as a basis for registering the aircraft in the name of the lessee, were leases between Irish and a U. S. air carrier. Thus in all cases Irish, a foreign carrier, was in fact the real owner of the aircraft (as opposed to the "owner" for registration purposes) and the same cabotage and public policy principles cited by petitioner in its moving affidavit (as well as in the arbitration) were applicable to these prior leases. Yet there had been no problem in registering these aircraft with the FAA.

30. Two of these prior leases which had been accepted by the FAA were leases between petitioner and Irish. In other words, the same parties had previously entered into the same type of lease transaction and the aircraft had been accepted for registration in the name of petitioner as lessee.

31. Petitioner claimed in the arbitration, and now claims in its moving affidavit, that one of the reasons the Irish—TCA agreement and the leases thereunder did not constitute a conditional sales contract within the meaning of the Act, was that no credit was given for rentals. Here again, however, one of the prior leases between Irish and domestic carriers which had been accepted by the FAA as a basis for registration in the name of the lessee contained no provision for crediting rentals against the option price.

32. One of the bases on which petitioner asserted in the arbitration, and asserts in the moving affidavit, that the agreement and the leases thereunder did not qualify as conditional sales contracts was petitioner's contention that there was no

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Opposing Affidavit of Ludwig A. Saskor (Excerpts)

intention to exercise the option. In addition, petitioner contended that the option price was so high that there were no circumstances under which petitioner would have exercised the option, and therefore the option was in effect a sham and the transaction violated Section 47.43(a)(4) of the FAA regulations which is cited in paragraph 10 of the moving affidavit. In answer to this argument, the following evidence was introduced in the arbitration:

(a) All witnesses who had been involved in the negotiation and drafting of the agreement, including petitioner's own witnesses, testified that the option was a genuine, bona fide option which petitioner was free to exercise at any time, and that there were no agreements, side letters or understanding that the option would not be exercised.

(b) There is no requirement in the Act or FAA regulations that there be an intention to exercise an option.

(c) If the option price was too high for there to be any intention to exercise the option, then *a fortiori* there was no intention to exercise the options in the prior leases between Irish and U. S. carriers which had been accepted by the FAA as a basis for registering the aircraft in the name of the lessee. When computed as a percentage of the actual value of the aircraft, the option prices in most of these prior leases were higher than in the agreement which was the subject of the arbitration.

(d) There were many factors which rendered the option extremely valuable, and many circumstances under which petitioner might have found it advantageous to exercise the option:

1. At the time the agreement was negotiated and entered into, the lead time for a 747 aircraft was roughly two years. By exercising its option, petitioner could avoid this extended waiting period (except for the 60 day notice which it was required to give where it elected to exercise the option).

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Opposing Affidavit of Ludwig A. Saskor (Excerpts)

2. Witnesses for both sides testified that the timing of aircraft acquisition is important. The ability to acquire a popular aircraft on short notice is so crucial that delivery positions on an aircraft manufacturing line are salable commodities. An expert witness produced by Irish testified that he was aware of airlines having paid prices equivalent to 25% or more of the purchase price of a new aircraft simply to acquire a favorable delivery position from another carrier.

3. The same expert witness testified that there have been a number of instances where airlines have paid as much or more for a used aircraft as for a new aircraft, and that in the late 1950's first generation jet aircraft which were then several years old were selling for as much as they had cost when brand new.

4. Irish itself had experienced a situation where it had bought new aircraft from the manufacturer, used the aircraft for several months on its routes and then sold the aircraft to another carrier, BOAC, for prices equivalent to 133% of the price which Irish had paid and 110% to 121% of the price at which the manufacturer was then selling the same model aircraft new. Here, as in the 747 situation, BOAC was willing to pay this premium in order to get immediate delivery of the aircraft because there was a substantial lead time if BOAC were to order the aircraft from the manufacturer (although not as long as in the case of the 747).

5. Petitioner's own witnesses admitted that due to long manufacturing lead times, airline officials were faced with the problem of ordering or not ordering new aircraft, and determining the quantities to be ordered, based upon their own forecasts of the airline market at the time the aircraft would be actually delivered (which in the case of the 747 was several years). If the forecasts

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proved to be incorrect the airline suffered accordingly, either because it did not have the aircraft to meet competition or because it had surplus aircraft. Under the terms of the Irish—TCA agreement, petitioner had an option to acquire the aircraft at any time throughout a five year term upon 60 days notice. Thus petitioner had maximum flexibility with no capital outlay and avoided entirely the foregoing problem of having to try to predict the future several years in advance. This was an extremely valuable feature and worth a considerable premium.

6. At the time the agreement was negotiated and entered into, petitioner was in an expansion phase. In addition, it was an active participant in several route proceedings before the Civil Aeronautic Board where it had applied for long range international routes. If it had been awarded such routes, it would have immediate need for additional long range aircraft. In its applications for such routes, petitioner had in fact proposed to use 747 aircraft on these routes. Irish's expert witness testified that the award of new routes was one of the circumstances under which a carrier might exercise an option to buy a used aircraft at a price in excess of the price of a new aircraft, in order to get immediate delivery and use of the aircraft for use on such routes.

7. The value of petitioner's option was forcefully brought home by evidence introduced in the arbitration that petitioner's successor in interest, American, had contracted to pay roughly 50% of the price of a new 747 aircraft merely for a fifteen month lease of a 747, while it was waiting for delivery of new 747's which it had ordered from the manufacturer.

33. In its moving affidavit, petitioner relies on the FAA opinion of November 3, 1970. Petitioner also relied on this

*Exhibit D**Opposing Affidavit of Ludwig A. Saskor (Excerpts)*

opinion in the arbitration. However, the evidence presented to the arbitrators thoroughly discredited this opinion:

(a) Perhaps the most telling evidence against the opinion was the written request for the opinion, which request was first drafted by petitioner's chief expert witness, Mr. Gaddis, and subsequently revised by American's Vice President and General Counsel. A copy of the request for the opinion as presented to the FAA and as introduced into evidence in the arbitration is annexed hereto as Exhibit I. Bearing in mind that petitioner and American, as its merger partner and successor in interest, had an express obligation under the agreement to use best efforts to register the aircraft, the request for an opinion was couched in such terms as to invite an adverse opinion on registration. To begin with, the request did not simply present the documents to the FAA and ask for the FAA's opinion. Rather, the request not only pointed out those provisions of the agreement which might support an adverse opinion on registration, but also recited alleged background facts which were subsequently shown to be misleading, inaccurate and incomplete.

(b) The draft request prepared by Mr. Gaddis contained no reference to Section 47.43(a)(4) of the FAA regulations which deals with a transaction not entered into in good faith. American's General Counsel changed the draft request so as to include a specific reference to this section. Following the reference to this section and its "good faith" provisions, the request stated:

"AA is particularly concerned about the possibility of a subsequent claim (e.g., by the insurers of the aircraft in the event of a loss claim) that the registration of the aircraft is invalid under Section 47.43 of the Federal Aviation Regulations. In this connection, we are advised that the option to purchase was included in the Lease for the purpose of facilitating United States registration of the aircraft, and that the option price has been fixed at an amount equal to 115% of the replacement cost of the

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aircraft. *In light of the excess of the option price over the replacement cost, it cannot in good faith be represented that TCA, at the time its interest in the aircraft was created or at any time thereafter, had or has any intention of exercising the option.*" (Emphasis supplied.)

In other words, the FAA was virtually told that the option was a sham.

(c) Although the request gave alleged background information to the FAA which might be considered adverse to registration, it recited none of that background information which favored registration. For example, since the FAA's prime concern is with matters of safety, it was important for the FAA to know that the aircraft would be maintained in accordance with FAA standards throughout the year and not only during the lease term of each year (indeed at that time American itself was about to enter into a contract with Irish for the year-round maintenance of these aircraft); that the manufacturer's lead time for delivery of a new 747 aircraft was approximately two years, thus making the option an extremely valuable one; that the option was exercisable at any time throughout the five year term of the agreement, again greatly increasing the value of the option; and that the option could be exercised by the lessee when one of the aircraft was brand new and when the other aircraft was only a few months old. In addition, in view of the request's thinly veiled suggestion that the option was a sham, it was important at the very least to point out to the FAA that the option was a genuine one and that there were no agreements or understandings that the option would not be exercised.

(d) One of the most important facts which the request failed to recite was that the transaction was extremely beneficial to petitioner, in that it enabled petitioner, a small domestic carrier, to compete with much larger carriers (Pan American and Eastern) on long range routes where these other carriers were likely to operate this type of aircraft.

Exhibit D to Item 6

*Exhibit D**Opposing Affidavit of Ludwig A. Saskor (Excerpts)*

(e) The request did not ask the FAA how the agreement might be revised or amended so as to render the aircraft registrable in petitioner's name, if the aircraft were not registrable under the agreement in its present form. This was an important consideration, since evidence introduced at the arbitration hearing indicated that where an agreement was not accepted by the FAA as a basis for registration, it was the FAA's practice to advise the parties how the agreement might be amended so as to render the aircraft registrable. In that connection, it was pointed out that in one of the prior lease transactions between the same parties, petitioner and Irish, the lease agreement when first presented to the FAA was not accepted as a basis for registration in petitioner's name because the option was exercisable only at a specific point in time rather than throughout the lease term; that at the suggestion of the FAA the parties thereupon amended the lease so as to provide that the option was exercisable throughout the lease term; and that the amendment was submitted to the FAA and the aircraft were then registered in petitioner's name. In addition, Irish submitted an affidavit of Joseph T. Brennan, who had been Chief Counsel at the FAA Aeronautical Center in Oklahoma City (the place where aircraft are registered and registration problems normally dealt with) which stated, among other things:

"I also believe that I advised Mr. Babcock, at the conclusion of the meeting, that if any problems with registration would occur at the time the final documents were presented, we would be glad to work with the parties in an attempt to achieve the desired result within the framework of the Federal Aviation Regulations and the Act. "Applicants for registration are normally advised, if they so request, as to the regulatory requirements if, for example, a lease with option which is presented contains an excessive option price, or if a lease contains no options at all, so that the parties can make the changes necessary to support registration in the name of the applicant."

Exhibit D to Item 6

*Exhibit D**Opposing Affidavit of Ludwig A. Saskor (Excerpts)*

(f) The request for the opinion was hand delivered to the FAA in Washington by Mr. Gaddis. Mr. Gaddis testified on cross examination that he spoke to Mr. Scheinbrood, the writer of the FAA opinion, and told Mr. Scheinbrood that in his opinion the agreement and the leases thereunder did not constitute conditional sales contracts within the meaning of the Act and that the aircraft were not registrable in petitioner's name. Moreover, Mr. Gaddis made the astounding admission that he tendered to Mr. Scheinbrood a copy of his own written opinion that the aircraft were not registrable. He further testified that he persisted in pressing his written opinion when Mr. Scheinbrood demurred, and that as a result of this persistence Mr. Scheinbrood had an assistant look at his opinion and copy down the authorities cited therein.

(g) Although he told the FAA of his own opinion that the aircraft were not registrable, Mr. Gaddis failed to advise the FAA of the opinion of Irish's counsel (of which he was then aware) that the aircraft were registrable. In addition, he failed to advise Mr. Scheinbrood that, just a few weeks previously, as noted below, FAA counsel at the Aircraft Registry in Oklahoma City had reviewed the agreement and lease form and given a verbal opinion that the aircraft *were* registrable.

(h) Prior FAA opinions on registration were introduced into evidence by Irish. These opinions established that the FAA practice alluded to by Mr. Gaddis of registering *all* aircraft under leases with options to purchase in the name of the lessee had been followed by the FAA for many years, and had even been followed by the FAA's predecessor agency. In view of this long standing administrative practice, it was pointed out to the arbitrators that under established principles of law, the FAA practice was entitled to great weight in interpreting the Act.

(i) Several weeks prior to the request for an FAA opinion from the FAA office in Washington, the agreement and lease form had been submitted to FAA counsel at the FAA Aeronau-

*Exhibit D**Opposing Affidavit of Ludwig A. Saskor (Excerpts)*

tical Center in Oklahoma City. Among the FAA facilities at the Aeronautical Center are the FAA Aircraft Registry, which is the department of the FAA that actually passes upon applications for registration, and deals on a daily basis with questions of registration. Counsel at the Aeronautical Center serve as counsel for the Aircraft Registry. The chief counsel at the FAA Aeronautical Center examined the agreement and lease form together with his assistant counsel. After such examination, the FAA Center Counsel gave a verbal opinion that the aircraft to be leased under the agreement and lease forms were registrable in petitioner's name.

(j) After learning that FAA Center Counsel in Oklahoma City had given an opinion that the aircraft were registrable, Mr. Gaddis advised American of this fact and attempted to convince FAA Center Counsel that their opinion was wrong. It was only a few weeks after the rendering of that opinion by FAA counsel in Oklahoma City that the application was made to the FAA in Washington for a contrary opinion. Moreover, as heretofore noted, when the application was made to Washington for such an opinion, Mr. Gaddis did not advise the Washington office that its Oklahoma City office had already passed on the same question and had found the aircraft to be registrable. Mr. Gaddis admitted on cross examination that whenever his firm had in the past sought an opinion on registration they had requested the opinion from the FAA in *Oklahoma City*, and that this was the first instance where his firm had ever applied to the FAA in Washington for an opinion.

(k) Between the time that the FAA in Oklahoma City rendered its opinion favoring registration and the time American applied to the FAA in Washington for a contrary opinion, discussions were had between petitioner and American on the one hand and counsel for Irish on the other hand. At that time, since it appeared that the major objection being raised on the registration issue was that the option price was too high, counsel

*Exhibit D**Opposing Affidavit of Ludwig A. Saskor (Excerpts)*

for Irish suggested that if this was an impediment to registration, the option price could be reduced. This suggestion was summarily rejected.

(1) Irish's counsel also suggested at the foregoing meeting that the true test of whether the aircraft were registrable was to simply present the contract documents to the FAA Aircraft Registry in Oklahoma City together with an application for registration in petitioner's name. In other words, he suggested following precisely the procedure which was prescribed in the agreement. He also suggested that both parties be present when the application for registration was presented. Although petitioner and American appeared to be agreeable to this procedure, four days later they foreclosed this procedure by applying to the FAA in Washington for an adverse opinion on registrability.

(m) The fact that petitioner and its merger partner, American, did not in fact believe there was any real problem on registration was revealed by a visit which American officials made to Irish in July 1970. At that time, the American officials indicated that they thought there was a problem on registration but that they did not intend to pursue the registration issue, and they offered to proceed with the lease agreement if Irish would agree to a 75% reduction in the term of the agreement. It was only when Irish rejected that proposal and after the FAA in Oklahoma City had given a verbal opinion that the aircraft were registrable, that an adverse opinion on registration was requested from the FAA in Washington.

(n) Thus, it was clear from the actions of petitioner and American as brought out in the arbitration, as well as from the wording of the request, that the underlying purpose in applying for the FAA opinion was to secure an opinion that the aircraft were not registrable and to seek to use that opinion as a basis for relieving petitioner and its merger partner, American, from their obligations under the agreement. It was pointed out to the arbitrators that if petitioner and American had simply wanted

*Exhibit D**Opposing Affidavit of Ludwig A. Saskor (Excerpts)*

to make sure that they had a written opinion supporting registration, it would have been a simple matter to apply for such an opinion to FAA Center Counsel in Oklahoma City, who had already examined the contract documents and given a verbal opinion that the aircraft were registrable.

(o) At the time the opinion was requested, it was represented to the FAA (as was then the case) that there was an agreement in existence which contemplated registration of the aircraft in petitioner's name or in the name of American as petitioner's successor. However, the agreement was terminated on September 2, 1970, at a time when the FAA had not yet rendered its opinion. Termination of the agreement rendered the request for an opinion as to registrability of the aircraft moot. However, obviously wanting the opinion not for the reasons stated but to support their dispute with Irish, neither petitioner nor American advised the FAA of the termination of the agreement. Had the FAA been advised of such termination, it very likely would have declined to render an opinion on this moot question.

(p) Similarly, when the opinion was issued neither petitioner nor American sought any reconsideration or review of the opinion. Again, their interest was in securing a weapon which they could use in their fight against Irish.

(q) It should be noted that petitioner maintained in the arbitration that it was its merger partner, American, who had thus sought to secure an adverse opinion on registration, and that petitioner was not bound by American's actions. However, evidence introduced at the arbitration hearing showed that American at the time effectively controlled petitioner, and that even if petitioner did not directly participate in the decision to attack registration, nevertheless by remaining silent while American attacked registration petitioner was bound by American's actions. In any event, petitioner's argument was rejected by the arbitrators, since they found that petitioner failed to use its best efforts to register the aircraft.

Exhibit D

Opposing Affidavit of Ludwig A. Saskor (Excerpts)

(r) All of the foregoing facts were pointed out to the arbitrators in their consideration of the FAA opinion. In addition, it was pointed out that under settled principles of administrative law, the FAA opinion was not binding on the parties; not binding on the courts; and in fact not binding on the FAA itself. It was also pointed out that even if the FAA opinion were considered a statement of the law, which it was not, it would have to be viewed as a change in the FAA's long standing interpretation of and practice under the law and a change in FAA policy, and as such would be unlikely to be sustained.

(s) In addition, as heretofore noted, it was pointed out to the arbitrators that notwithstanding the FAA opinion, if the parties had in fact wanted to register the aircraft the FAA would have helped the parties to attain that result.

A 250

Exhibit E

**Affidavit of Leonard Steibel in Opposition to Motion
to Stay Arbitration (see supra at A 146 through
paragraph 9 on A 150)**

Exhibit E to Item 6

Exhibit F

Reply Affidavit of Andrew C. Hartzell, Jr.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In The Matter of The Application of
TRANS CARIBBEAN AIRWAYS, INC.,
Petitioner-Appellant,

For A Judgment Staying The Arbitration Commenced By
Aerlinte Eireann Teoranta, And For A Declaratory Judgment
against

AERLINTE EIREANN TEORANTA and AMERICAN
ARBITRATION ASSOCIATION, INC.,
Respondents-Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANDREW C. HARTZELL, JR., attorney for Trans Caribbean Airways, Inc. ("TCA") being duly sworn, deposes and says:

The answering affidavit of AET's counsel, Ludwig Saskor, Esq., sworn to April 12, 1971, discloses in paragraph 3 the basic fallacy in AET's position. The crux of that position is that the arbitrators are not permitted, and the courts not required, to deal with remedies, since the remedies in Section 9.2 of the Agreement are automatic once there has been a default. A finding as to default is therefore said to resolve the controversy.

Such a position is illusory. It leaves no tribunal to deal with such obvious questions as materiality of a breach, harshness of remedies, mitigation of damages, etc. TCA's interpretation, on the other hand, avoids this unnatural and inconclusive result. It permits the arbitrators to decide completely—inclusive of remedies—all controversies where AET has not terminated the Agreement, and permits the courts to decide completely—inclusive of

Exhibit F to Item 6

Exhibit F

Reply Affidavit of Andrew C. Hartzell, Jr.

remedies in the light of Section 9.2—all controversies where AET has elected to terminate. TCA's interpretation, therefore, is logical and consistent throughout, and fully in accord with the language of the Agreement.

ANDREW C. HARTZELL, JR.

Sworn to and subscribed
before me this 12th day
of April, 1971.

WILLIAM P. DEAN
Notary Public

WILLIAM P. DEAN
NOTARY PUBLIC, State of New York
No. 60-0890170
Qualified in Westchester County
Cert. filed in New York County
Term Expires March 30, 1974

**Supplemental Affidavit in Opposition to AET's
Motion to Dismiss the Amended Complaint**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANDREW C. HARTZELL, JR., having been duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Debevoise, Plimpton, Lyons & Gates, attorneys for American Airlines, Inc. Pursuant to leave of the Court, I submit this supplemental affidavit in response to AET's reply memorandum and the reply affidavit of Ludwig Saskor.

2. AET continues to lard the record by submitting voluminous papers containing sharply disputed issues of fact, none of which can be resolved by the Court in the context of AET's motion to dismiss under Rule 12(b). Much of AET's reply papers is devoted to its argument that the arbitration award—although totally silent with respect to the registration issue—somehow necessarily resolved that issue. It is important to note that this contention is flatly contrary to the position which AET itself took during the arbitration. As AET stated in its pre-hearing memorandum in the arbitration,

"The issue raised by . . . [AET's] demand for arbitration is whether TCA was in default at the time . . . [AET] terminated the Agreement. . . . If the Agreement was thus properly terminated, there can be no issue as to registrability of the aircraft. . . . TCA's attempt to raise the abstract issue of whether the aircraft is 'lawfully registrable in the United States' is a meaningless exercise which

*Supplemental Affidavit in Opposition to AET's
Motion to Dismiss the Amended Complaint*

*can have no bearing on this arbitration or on the rights
and obligations of the parties under the Agreement.”
(Emphasis added.)*

A copy of the relevant pages of AET's pre-hearing memorandum is attached hereto as Exhibit A.

3. Having told the arbitrators that the registration issue did *not* “necessarily” have to be determined, and having obtained an award which did not purport to determine that issue, AET should not be permitted now to assert for the first time a totally different position and interpretation of the award.

ANDREW C. HARTZELL, JR.
Andrew C. Hartzell, Jr.

(Sworn to by Andrew C. Hartzell, Jr. on March 28, 1973.)

Exhibit A

Excerpt from AET's Pre-Hearing Memorandum

AMERICAN ARBITRATION ASSOCIATION, Administrator
Commercial Arbitration Tribunal

In the Matter of the Arbitration
between

AERLINTE EIREANN TEORANTA
and

TRANS CARIBBEAN AIRWAYS, INC.
Case Number: 1310 1038 70

CLAIMANT'S MEMORANDUM

**TCA'S CONTENTION THAT THE AIRCRAFT IS
"NOT LAWFULLY REGISTRABLE IN THE UNITED
STATES" IS NOT A VALID DEFENSE OR A
VALID COUNTERCLAIM.**

The issue raised by Irish's demand for arbitration is whether TCA was in default at the time Irish terminated the Agreement. If TCA was in default at the time of termination (as "Event of Default" is defined under Section 9.1 of the Agreement), Irish clearly had the right to terminate the Agreement.

If the Agreement was thus properly terminated, there can be no issue as to registrability of the aircraft. It is only *actual* inability to register the aircraft, after attempting to do so, which gives TCA the right to terminate the Agreement (and then only if such inability occurs in the Initial Period). TCA's attempt to raise the abstract issue of whether the aircraft is "lawfully registrable in the United States" is a meaningless exercise which can have no bearing on this arbitration or on the rights and obligations of the parties under the Agreement.

The Agreement was negotiated over a long period of time. Both parties were represented by competent counsel throughout the negotiations. There were many drafts and re-

* * *

Exhibit A to Item 7

Memorandum Opinion of Judge Wyatt, December 14, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 309

AMERICAN AIRLINES, INC.,

Plaintiff,

against

AERLINTE EIREANN TEORANTA,

Defendant.

APPEARANCES:

DEBEVOISE, PLIMPTON, LYONS & GATES, ESQS.

Attorneys for Plaintiff

299 Park Avenue

New York, New York 10017

ANDREW C. HARTZELL, JR., ESQ.

STANDISH F. MEDINA, JR., ESQ.

Of Counsel

SMITH, STEIBEL & ALEXANDER, ESQS.

Attorneys for Defendant

460 Park Avenue

New York, New York 10022

WYATT, DISTRICT JUDGE,

This is a motion by defendant (AET), whose Gaelic name is translated "Irish International Airlines", for an order dismissing the complaint on various grounds. Fed. R. Civ. P. 12 Affidavits have been submitted for and against the motion, which is treated as one for summary judgment. Fed. R. Civ. P. 56.

Item 8

Memorandum Opinion of Judge Wyatt, December 14, 1973

Defendant (AET) is an Irish corporation, an air carrier, with its principal place of business in Dublin.

Plaintiff (American) is a Delaware corporation, also an air carrier, with its principal place of business in New York City.

Trans Caribbean Airways, Inc. (TCA) was a Delaware corporation, also an air carrier, which on March 8, 1971 was merged into plaintiff.

This action had its origin in an agreement between AET and TCA, dated February 8, 1968. By the terms of the agreement, AET and TCA were to execute leases under which TCA, as lessee from AET, would for five years have the use during the winter months of two Boeing 747 aircraft, then on order by AET from the maker. The lease period was to begin for one aircraft in 1970, and for both aircraft in October 1971, the lease period was to end on May 15, 1975. The idea of the agreement was to keep the planes at all times in useful service, the busy season for AET being in the summer months and the busy season for TCA being in the winter months.

The form of lease to be entered was annexed to the agreement. This contemplated that the leased aircraft would be registered under the Federal Aviation Program (49 U. S. C. § 1401). The lease form (Section 19.2) provided that if "notwithstanding TCA's best efforts and for reasons beyond its control" TCA was "unable to effect registration" and if as a result "the Aircraft is grounded and the time during which the Aircraft cannot be operated by TCA continues for a period of more than 10 days and AET has reasonably estimated, after consultation with TCA, that TCA will not be able to cure such condition within 30 days from the date that such inability commenced, AET shall have the right to have the Aircraft redelivered to it within 2 days after serving written notice thereof on TCA whereupon this Lease shall terminate and TCA shall have no further liability hereunder. In the event that AET does not exercise its right to have the Aircraft redelivered and such inability continues for a period of

Memorandum Opinion of Judge Wyatt, December 14, 1973

30 days, this Lease shall automatically terminate and neither party shall have any further liability to the other hereunder. . . ."

As a part of the 1968 agreement, there was also "Letter Agreement No. 1", section (6) of which provided in relevant part as follows:

"If any of the events stipulated in Section 19.2 of Exhibit 1 [the lease form] of the Agreement occur and as a result of which the lease for the Initial Period is cancelled and, if AET and TCA, notwithstanding their best efforts, are unable to cure the relevant condition, the Agreement shall terminate under the conditions provided for in section 13.1 of the Agreement."

In January 1970, American and TCA announced plans to merge. From then on, American directed the moves of TCA as to the agreement with AET and counsel for American, the same now appearing in the case at bar, acted at all relevant times for TCA.

In July 1970, counsel for American began questioning whether the AET aircraft could be registered, and advised TCA and AET of these questions.

American hired lawyers in Oklahoma City, one of whom (Gaddis) hand delivered in Washington at the FAA a writing dated August 21, 1970 to Oscar Shienbrood who describes himself as "Acting Associate General Counsel, General Legal Services Division, GC-10." This writing appears to ask if the aircraft to be leased by TCA from AET "will be eligible" for registration. The circumstances of this inquiry seem highly questionable, to say the least. Among other things, aircraft registration questions appear normally to be dealt with at the FAA Aircraft Registry in Oklahoma City where FAA has an "Aeronautical Center", the counsel for which is said to act as counsel to the Aircraft Registry. This would appear to be the reason for American hiring a lawyer in Oklahoma City. Why the Oklahoma City

Memorandum Opinion of Judge Wyatt, December 14, 1973

lawyer would go all the way to Washington to see Shienbrood, instead of seeing counsel next door at the Aircraft Registry, is not easy to understand.

AET terminated the agreement on September 2, 1970, because TCA was then said to be in default, having failed (a) to make an advance payment of \$85,000 and (b) to execute the first seasonal lease under the 1968 agreement. TCA denied that it was in default.

AET on September 23, 1970 served a demand for arbitration, there was a provision for arbitration in the 1968 agreement (Section 13.7), which was to be in New York City and under American Arbitration Association rules.

Arbitration was required by the 1968 agreement as to "any dispute" except "as herein provided to the contrary in Section 9.2". The provision "to the contrary in Section 9.2" reads as follows:

"In addition, AET may proceed to protect and enforce its rights by any action, suit or proceedings (in equity or at law) whether for specific performance of any covenants or agreement or in aid of the exercise of any power granted by this Agreement."

This provision seems clearly for the benefit of AET, not TCA. The exception to arbitration was to enable AET to pursue in the courts its remedies after default by TCA.

After AET demanded arbitration and on October 2, 1970, TCA began a proceeding in the New York Supreme Court, New York County, for a stay of the arbitration demanded by AET. TCA also asked for a declaratory judgment that AET had wrongfully terminated the agreement and that TCA could recover "advance payments" of \$335,000 under the agreement.

On October 13, 1970, the state court (Mr. Justice Gomez) entered an order granting a motion by TCA for a stay of the arbitration demanded by AET. The basis for the stay was that

Memorandum Opinion of Judge Wyatt, December 14, 1973

the demand for arbitration was defective in that it did not state "the specific issues to be arbitrated".

On October 15, 1970, AET served a new demand for arbitration. Among the "specific issues" for which arbitration was demanded was the "failure and refusal" of TCA "to use its best efforts to promptly obtain all required registrations".

On October 23, 1970, TCA moved again in the state court for a stay of arbitration. The argument was made that there was no agreement to arbitrate whether a default had occurred; it was also argued that the demand was defective because it did not state to what "registrations" it referred. TCA again asked for a declaratory judgment.

Under date of November 3, 1970, Shienbrood wrote to Gaddis, American's Oklahoma City lawyer. There is no direct reply to the inquiry earlier made but the letter does say that "under our conclusion, TCA would not be considered the owner of the aircraft for registration purposes". To whom the "our" refers does not appear, nor whether it includes anyone other than Shienbrood.

TCA, aware of the Shienbrood letter, did not at any time advise the state court of such letter nor rely in any way on any impossibility of registration as affecting the requested stay of arbitration and declaratory judgment.

On December 16, 1970, the state court entered an order and judgment denying to TCA a stay of arbitration. An opinion of Mr. Justice Leff dated December 7, 1970, had been filed. This opinion noted that the dispute was whether TCA had been in default under the agreement. It was held that this dispute must be determined by arbitration. The claim of TCA to a declaratory judgment was held to be without merit, as also covered by the arbitration clause.

On March 8, 1971, the merger of TCA into American became effective.

Memorandum Opinion of Judge Wyatt, December 14, 1973

On March 29, 1971, the Appellate Division affirmed without opinion the denial to TCA of a stay of arbitration (319 N. Y. S. 2d 982). Leave to appeal was denied by the Court of Appeals on June 9, 1971 (324 N. Y. S. 2d 1925).

Thereafter there was an arbitration under the administration of American Arbitration Association.

The arbitration hearings commenced on December 20, 1971.

TCA had submitted the Shienbrood letter to the arbitrators with a Pre Hearing Memorandum. This letter was there described (p. 31) as follows:

"On November 3, 1970, the FAA issued a formal opinion in which it stated that the aircraft were not registerable. A copy of that opinion is attached as Exhibit I."

The description seems a gross exaggeration. The Shienbrood letter was not "a formal opinion"; it was not "issued" by the FAA; and it does not state that "the aircraft were not registerable". The letter is not even signed for the FAA. It appears to be no more than the opinion of Shienbrood, given under most equivocal circumstances. For all that appears, those in the FAA with ultimate responsibility for registration were of an opinion contrary to that of Shienbrood.

TCA had also filed an "Answering Statement" dated January 25, 1971. Among the defenses asserted was one that "the aircraft were not lawfully registerable in the United States" (p. 4) and on that account the claims of AET were "moot". In this pleading, TCA asserted a counterclaim for a declaration that TCA had no further obligations under the 1968 agreement, among other reasons "because the aircraft were not lawfully registerable in the United States" (p. 5). In this pleading, TCA stepped up its exaggeration of the Shienbrood letter by declaring that "the Federal Aviation Administration . . . ruled that the aircraft could not be so registered" (p. 4).

Memorandum Opinion of Judge Wyatt, December 14, 1973

After the arbitration hearings began on December 20, 1971, they continued from time to time until July, 1972. The three arbitrators were all lawyers. There were thirty days of hearings, some 6000 pages of transcript, and several hundred exhibits.

TCA introduced into evidence the Shienbrood letter and three of its witnesses (including Gaddis) gave expert testimony that the aircraft were not lawfully registerable.

After the hearings were concluded, TCA submitted a "Post-Hearing Memorandum", dated September 29, 1972. This memorandum argued extensively that TCA could not lawfully register the aircraft.

AET argued extensively to the arbitrators that the aircraft were registerable. Among other things, AET pointed out that the Shienbrood letter was not controlling; that FAA counsel in Oklahoma City and "FAA General Counsel's Office in Washington" had an opinion contrary to that of Shienbrood; and that the latter's November 3, 1970 letter was "contrary to prior FAA opinions and contrary to then existing FAA practice".

The three arbitrators made an award dated January 3, 1973. The award was that TCA was in default under the agreement and that AET had properly terminated the agreement. The counterclaim by TCA was dismissed.

The arbitrators found that TCA was in default as of September 2, 1970, because

- (1) it had failed to pay a sum of \$85,000 to AET;
- (2) it had failed to execute a lease for the initial period; and
- (3) it had failed "to use its best efforts to register the aircraft".

While the award is dated January 3, 1973, it is stated in the moving affidavit (para. 17) that it "was delivered to the parties on January 17, 1973".

Memorandum Opinion of Judge Wyatt, December 14, 1973

On the very next day—January 18, 1973—TCA came to this Court and commenced this action by filing the complaint.

AET then moved in the state court proceeding for confirmation of the award. TCA opposed. The motion was submitted to the state court on January 24, 1973.

On February 8, 1973, AET served notice of the motion now being considered.

On February 22, 1973, TCA filed in this Court an amended complaint.

The amended complaint purports to state five claims (each referred to as a "cause of action").

Each claim is for a declaratory judgment.

The first claim avers that the two aircraft to be leased by AET to TCA were required (49 U. S. C. § 1401) to be registered in the name of TCA with the Federal Aviation Administration (FAA) before they could be used by TCA; and that the two aircraft could not lawfully be registered with FAA.

The second claim avers that since the aircraft could not be registered with FAA, the 1968 agreement by its terms "would have come to an end".

The third claim avers that since the aircraft could not be registered with FAA, there was a failure of a basic condition of the 1968 agreement.

The fourth claim avers that the termination by AET of the 1968 agreement was "improper and unconscionable".

The fifth claim avers that Section 9.2 of the 1968 agreement is a "penal provision and is unenforceable under the laws of the State of New York" because it "provides for termination and excessive damages under circumstances which are unconscionable" and because the damages to AET "resulted from its [the 1968 agreement] improper termination and not from any default by TCA".

Memorandum Opinion of Judge Wyatt, December 14, 1973

The declaratory judgment sought on the first three claims is that the aircraft could not lawfully have been registered and that AET therefore cannot recover anything.

The declaratory judgment sought on the fourth claim is that AET was not entitled to terminate the 1968 agreement.

The declaratory judgment sought on the fifth claim is that Section 9.2 of the 1968 agreement is a penal provision and not enforceable under New York law.

Jurisdiction is asserted on the basis of federal questions and of diversity of citizenship.

Movant AET then asked that its motion addressed to the original complaint be made applicable to the amended complaint. This request was granted and a supplemental moving affidavit was submitted.

On March 7, 1973, the state court (Mr. Justice Chimera) filed an opinion granting the motion of AET to confirm the award. TCA then moved for reargument ("reconsideration") and for "clarification". The point made by TCA was that AET was contending in the case at bar that the arbitration award had decided that its aircraft could be lawfully registered. TCA denied that the award had so decided and urged the state court on that basis to vacate the award or at least to "clarify its decision to delineate what has or has not been decided". TCA argued at length that the aircraft could not lawfully be registered and if the award decided otherwise it was contrary to public policy and had to be vacated.

There was oral argument before me of the present motion in the case at bar on March 16, 1973.

On June 4, 1973, the New York County Supreme Court denied the motion by TCA for reargument as to the confirmation of the award of the arbitrators in favor of AET and for "clarification".

On June 19, 1973, an order and judgment was entered in the New York County Supreme Court confirming the award of the

Memorandum Opinion of Judge Wyatt, December 14, 1973

arbitrators in all respects and dismissing the counterclaim of TCA.

On July 3, 1973, AET commenced an action (73 Civ. 2933) in this Court against American, as successor to TCA, for \$7,012,161, plus interest. The sum demanded was said to be due under Section 9.2 of the 1968 agreement. Diversity jurisdiction was asserted.

On July 20, 1973, AET filed an amended complaint in its action, adding a claim for insurance on the aircraft.

On August 6, 1973, American answered in that action and on August 13, 1973, AET served a demand for a jury trial.

A.

From the history of the dispute and of the arbitration, it seems clear that summary judgment for defendant on the first four claims is required because these claims in the amended complaint raise issues already determined against plaintiff in the arbitration.

The first three claims are based on the argument that the aircraft could not lawfully be registered. This argument was specifically addressed to the arbitrators and the award necessarily decided the point against plaintiff.

The fourth claim is based on the argument that termination of the 1968 agreement was "improper and unconscionable". This argument also was specifically addressed to the arbitrators. The "additional defenses" in the "Answering Statement", for example, specifically asserted that "AET in bad faith terminated the Agreement" and further that "it terminated the Agreement in bad faith". The award was that TCA was in default and that AET "followed proper procedure in effectuation of cancellation".

Whether under *res judicata* or under collateral estoppel, issues litigated and determined in a prior action are forever determined as between the parties. *Lawlor v. National Screen Service*, 349 U. S. 322, 326 (1955).

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B.

As to the fifth claim, by the terms of the 1968 agreement it is not available to TCA because in the 1968 agreement (Section 11) TCA warranted to AET that such agreement and any lease thereunder "constitute and will constitute with respect to any such lease the valid and binding obligation of TCA enforceable in accordance with their terms". TCA further warranted to AET that "no law . . . would be contravened by the execution, delivery or performance by TCA of the terms of this agreement".

C.

As to the first three claims, TCA may not assert as against AET that the aircraft could not be lawfully registered.

The 1968 agreement between the parties, the lease form to be executed by the parties, and Letter Agreement No. 1 all recognized that registration was necessary and might prove to be impossible. Therefore, provision was made for the procedure for securing registration and the consequences if such procedure did not result in registration.

1. The parties agreed (2.4 of agreement) to execute a lease of the aircraft in form annexed as Exhibit 1.

2. The lease (Exhibit 1) provided (4.1) that TCA would "use its best efforts to effect registration of the aircraft".

3. The lease provided (19.2) that if "notwithstanding TCA's best efforts and for reasons beyond its control" TCA was unable to effect registration, then *if* certain further conditions were met "this lease shall terminate".

4. The further conditions (19.2) were

(a) that the aircraft be "grounded" for want of registration;

(b) that this condition continue for more than 10 days; and

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(c) that AET has "reasonably estimated" that TCA cannot cure the condition within 30 days.

If these conditions are met, then the lease terminates.

5. If the lease terminates and *if then*, notwithstanding the "best efforts" of AET and TCA, they are "unable to cure" the lack of registration, then the 1968 agreement "shall terminate".

The procedure provided for securing registration was never followed because of the defaults of TCA.

The lease was never executed by TCA, an event of default established by the award.

TCA never used "its best efforts to register the aircraft", an event of default established by the award.

None of the further conditions were met by TCA.

On the undisputed facts and on the award, TCA has no claim whatever by reason of any issue as to registration of the aircraft.

D.

This action is one for a declaratory judgment. There is no merit to any of the claims asserted by plaintiff and on that account summary judgment is required.

But if it be assumed that as to the remedies of TCA under Section 9.2 of the 1968 agreement, there are issues sought to be stated in the five claims and which survive the arbitration, such issues ought not to be determined in this declaratory judgment action.

This action seems plainly a device and stratagem of TCA to stall or delay the pursuit by AET of its remedies for the established defaults of TCA.

If there be any further defenses of TCA surviving the arbitration, these can be better determined in an action by AET to

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enforce its remedies. Such an action has already been instituted by AET in this Court.

Whether to proceed with a declaratory judgment action is a matter for the discretion of the Court, there is "no compulsion to exercise that jurisdiction". *Brillhart v. Excess Insurance Co.*, 316 U. S. 491, 494 (1942).

Even if TCA had some claim on the merits, discretion would here be exercised to decline jurisdiction of this action.

The motion, treated as one for summary judgment, is granted. The Clerk is directed to enter judgment in favor of defendant.

SO ORDERED.

Dated: New York, New York
December 14, 1973

INZER B. WYATT
United States District Judge

Judgment

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

Defendant having moved the Court for an order dismissing the complaint on various grounds pursuant to Federal Rule of Civil Procedure (12). Affidavits have been submitted for and against the motion, which is treated as one for summary judgment. Federal Rule of Civil Procedure 56, and the said motion having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the Court thereafter on December 14, 1973, having handed down its opinion granting the said motion and directing the Clerk to enter judgment in favor of defendant, it is,

ORDERED, ADJUDGED AND DECREED, that defendant AER-LINTE EIREANN TEORANTA, have summary judgment against the plaintiff, AMERICAN AIRLINES, INC., dismissing the complaint.

Dated: New York, N. Y.
December 17, 1973

RAYMOND F. BURGHARDT
Clerk

**Plaintiff's Memorandum of Law in Support of its
Motion for Leave to Reargue Pursuant to
this Court's General Rule 9(m)**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR LEAVE TO REARGUE PURSUANT TO
THIS COURT'S GENERAL RULE 9(m)**

This memorandum is submitted on behalf of plaintiff American Airlines, Inc. ("American") in support of its motion, pursuant to Rule 9(m) of this Court's General Rules, for leave to reargue the motion decided by this Court in its memorandum decision, dated December 14, 1973. Treating the motion by defendant Aerlinite Eireann Teoranta ("AET") as a motion for summary judgment, the Court dismissed American's amended complaint.

**I. THE COURT'S OPINION CONTAINS NUMEROUS FACTUAL
ERRORS AND ALSO ASSUMES AS TRUE FACTS
WHICH ARE SHARPLY DISPUTED**

The Court's recitation of facts contains numerous misstatements of fact and erroneous conclusions based on inaccurate factual premises. It sharply criticizes both American and its counsel on the basis of facts which are misunderstood or hotly disputed. For these reasons we submit that reargument should be granted.

The more important of the mistaken or controverted facts are discussed below in the order in which they appear in the opinion.

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- (A) "In January 1970, American and TCA announced plans to merge. From then on, American directed the moves of TCA as to the agreement with AET and counsel for American, the same now appearing in the case at bar, acted at all relevant times for TCA." (Op. at 3)

Although American and TCA announced plans to merge in January 1970, American did not thereafter "direct . . . the moves of TCA as to the agreement with AET." TCA throughout this period had its own officers and outside counsel. Because of the pending merger and because of TCA's precarious financial condition, American—with specific CAB approval—loaned money to TCA to keep TCA operating. In addition, during the summer of 1970, American provided extensive technical assistance on a crash basis to help TCA prepare for November delivery of the aircraft and, as a result, TCA was operationally prepared to take the aircraft. But the Civil Aeronautics Board, when approving an interim financing agreement between American and TCA in early 1970, directed American not to control TCA prior to the merger and American did not do so. The Court's statement is factually erroneous and in any event no such factual conclusion can be made on a motion for summary judgment.

Similarly, the Court's statement that "counsel for American, the same now appearing in the case at bar, acted at all relevant times for TCA", is in error. Counsel in this case had no knowledge of and did not participate in any of the disputed events until they were consulted by American (not TCA) *after* AET had terminated the Agreement on September 2, 1970. It was then that they wrote, on behalf of American, to invite AET to confer jointly with the FAA. And it was only in late September 1970, at the time the first Demand for Arbitration was served, that they were asked to act for TCA. We submit that the actions

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of American in the summer of 1970, as well as the separate actions of TCA, as more fully described below, were both proper and required by a prudent concern for their separate economic interests. But the undersigned, contrary to the Court's opinion, were in no way involved in such events prior to September 1970.

- (B) "In July 1970, counsel for American began questioning whether the AET aircraft could be registered, and advised TCA and AET of these questions." (Op. at 3)

Questions as to the registrability of AET's aircraft were first raised not by American's counsel, nor by American, nor by TCA, but by Eastern Airlines in June 1970. American had asked Eastern whether it would sublease the aircraft from American after consummation of the merger (or from TCA, if delivery occurred prior to the merger). Eastern expressed interest in the sublease. However, unknown to American, Eastern's senior legal officer (Harlan) had requested and obtained from Eastern's outside general counsel in Atlanta a detailed written opinion, dated June 23, 1970, which stated that the AET aircraft could not be used in the United States. The opinion concluded with the following language:

"We have no explanation for the Trans Caribbean-Aerlinte lease. Neither we nor anyone on the CAB's staff could suggest how the airplane might be used lawfully by Trans Caribbean."

Without disclosing that he had received such an opinion, Harlan asked American whether the aircraft could be properly flown in U. S. domestic air commerce. American's Assistant General Counsel (Lempert) looked into the matter, and saw a problem in both the statute and regulations relating to ownership and registration. On July 17, 1970, Lempert wrote TCA, setting forth the problem and urgently asking for a meeting with TCA

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and AET to discuss it.* (Hartzell Affidavit, sworn to March 13, 1973, Exhibit A.)

Although originally scheduled for early August, the meeting was postponed until August 17, apparently because of the death of one of AET's New York attorneys (Smith). When the meeting was finally held, another of AET's New York attorneys (Steibel) advised American's representative that AET's Washington law firm (Reavis Pogue) had checked with the FAA and had obtained an "opinion" that the planes could be registered. He did not, however, supply American with a copy of any such opinion, or say if it was oral or written, or explain how or why such a registration would be legal. In short, Steibel presented nothing to allay American's legitimate concern.

In the meantime, Eastern was pressing American to get a definite answer on the registration question. Harlan of Eastern, also on August 17, telephoned American's General Counsel (Overbeck). Overbeck said that he understood that the Reavis Pogue firm had contacted the FAA and had obtained an opinion that the aircraft could be registered. Since the Reavis Pogue firm also acted in some legal matters for Eastern, Harlan telephoned them directly. They told Harlan, according to his testimony at the arbitration (Tr. 2676-77), that "as a result of just discussions with the FAA people in Oklahoma City", held "on a rather informal basis", they had received an "indication" that the AET aircraft could be registered. When at the arbitration Harlan

* AET and its attorneys had long been aware of the registration problem. For example, on November 30, 1967, AET's Washington, D. C. law firm (Reavis Pogue) wrote to AET's Assistant Secretary, noting that there was "no FAA ruling" on "this sort of periodic leasing with option to purchase" and expressing the "fear that in view of the successive leases *the FAA might rule that the option to purchase feature was not a legitimate option but simply a subterfuge to permit the transfer of registration.*" (Emphasis added.)

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was asked whether this satisfied him on the registration question, he replied, "No, it certainly did not."

- (C) "American hired lawyers in Oklahoma City, one of whom (Gaddis) hand delivered in Washington at the FAA a writing dated August 21, 1970 to Oscar Shienbrood who describes himself as 'Acting Associate General Counsel, General Legal Services Division, GC-10.' This writing appears to ask if the aircraft to be leased by TCA from AET 'will be eligible' for registration. The circumstances of this inquiry seem highly questionable, to say the least. Among other things, aircraft registration questions appear normally to be dealt with at the FAA Aircraft Registry in Oklahoma City where FAA has an 'Aeronautical Center', the counsel for which is said to act as counsel to the Aircraft Registry. This would appear to be the reason for American hiring a lawyer in Oklahoma City. Why the Oklahoma City lawyer would go all the way to Washington to see Shienbrood, instead of seeing counsel next door at the Aircraft Registry, is not easy to understand." (Op. at 3-4)

Gaddis became involved in the dispute at bar almost by accident. On July 15, 1970 Lempert telephoned Gaddis to discuss unrelated matters concerning transfer of registrations of other TCA aircraft to American upon the consummation of the merger. Gaddis was contacted because his firm is widely known in aircraft circles as expert on aircraft registration matters, although Lempert himself did not know Gaddis. During this conversation Lempert described the AET-TCA Agreement and asked Gaddis about registering the AET aircraft. Gaddis replied that, in his opinion, the AET aircraft could not be legally registered in the United States.

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Thereafter, on August 6, 1970, following a meeting between American and Eastern operations personnel, another Eastern lawyer (Wallace) telephoned Lempert and Gordon (an American vice president) and insisted that the registration issue had to be settled. The next day Lempert telephoned Gaddis and requested a formal opinion on the question. On August 17, Gaddis telephoned Lempert and told him the substance of the written opinion which Gaddis mailed to American that day. The opinion stated that the Agreement was not a conditional sales contract—that is, TCA was not really purchasing the aircraft, was not therefore the “owner” under FAA regulations, and could not register the aircraft in its name. In view of the pressure from Eastern, the conflicting viewpoint which Steibel said Reavis Pogue had obtained from the FAA, and the urgency of costly preparations for delivery of the first aircraft, Lempert asked Gaddis during the telephone conversation of August 17 to consider the best method for promptly obtaining a formal opinion from the FAA.

Gaddis thereupon telephoned Woodruff, one of the two attorneys at the FAA Center Counsel's office in Oklahoma City who had already talked to the Reavis Pogue lawyer. Woodruff's office is subordinate to the FAA General Counsel's office in Washington and regularly looks to Washington for a definitive response on complicated registration problems. At the arbitration, Gaddis testified as to why American's request for an opinion was submitted to the FAA in Washington (Tr. 4383-85):

“Q. You mentioned Mr. Shienbrood. How did you—did you know him? How did you have his name?

“A. No, I did not.

After Mr. Lempert on the 17th asked us, asked me to consider what approach should be taken in obtaining the opinion, I, between the 17th and the 19th, talked

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to Mr. Woodruff and asked him whether or not the request should be directed to him there in Oklahoma City or to someone in Washington, and he advised me to make the submission to the general counsel's office in Washington, especially since we were anxious, as I had told him, to get an answer as quickly as possible.

He said that their workload in Oklahoma City had increased substantially during this period of time as the result of a new program that they had undertaken and that if we expected to get a quick answer from their office with only two lawyers in the office, that we were probably better to go to Washington, and he also indicated that the general counsel's office in Washington has final review authority over any opinion and in fact it would be the general counsel's office who would decide the issue ultimately, and that within Mr. Sheinbrood's office there was an attorney by the name of Gerald Krassa, who he considered to be the expert on registration questions, had been with the FAA for many years, and that really he was the man who would be asked to consider the question and that if we submitted it to Oklahoma City he would just have to forward it to Washington but that by the joint submission we would get it to both offices and then if there was to be any coordination between the two or any questions arose concerning the matter that they could both consult with one another or the offices could consult and have the opinion there in front of them at the earliest possible time.

"Q. Now, how was it decided that between you and Mr. Lempert about hand delivery of this thing rather than mailing; what was your discussion on that?

"A. Well, I had initially suggested that we just mail these but Mr. Lempert insisted that in view of the need

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for a decision as quickly as possible that we actually deliver in Washington our copy, our request for the opinion, as soon as possible, and that rather than relying upon the mails that the best thing he thought was for me to actually go to the FAA and deliver it.

He said, too, that that would impress upon them our desire for a decision as quickly as possible and in presenting it I could specifically make that appeal.

"Q. Now——

"A. In other words, he was afraid if we just sent a letter up there it would get lost on somebody's desk and we might never hear.

It would be harder to ignore the letter if they recalled that somebody had actually come from Oklahoma City to Washington to get the answer."

To insure proper liaison between the FAA's Washington office and its Oklahoma City office, a copy of American's request for an FAA opinion was hand-delivered to Woodruff's office on the same day it was delivered in Washington. The letter itself lists Woodruff as being copied. In short, there was nothing "questionable" or improper about the manner in which American sought an opinion from the FAA.

- (D) "TCA had submitted the Shienbrood letter to the arbitrators with a Pre Hearing Memorandum [which described the letter as a formal opinion issued by the FAA in which it stated the aircraft were not registrable]. The description seems a gross exaggeration. The Shienbrood letter was not 'a formal opinion'; it was not 'issued' by the FAA; and it does not state that 'the aircraft were not registrable'. The letter is not even signed for the FAA. It appears to be no more than

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the opinion of Shienbrood, given under most equivocal circumstances. For all that appears, those in the FAA with ultimate responsibility for registration were of an opinion contrary to that of Shienbrood." (Op. at 7)

We respectfully submit that the Court's characterization of the Shienbrood letter is incorrect and that, in fact, the letter does constitute a formal ruling by the FAA, the federal agency charged with primary jurisdiction for determining the registrability of aircraft.

In an affidavit executed by Shienbrood on December 21, 1971, and submitted at the arbitration, Shienbrood describes his letter as "the opinion letter . . . in which *the FAA concluded that the aircraft* referred to in the letter *could not be registered* by TCA in the United States", and further as "*the FAA's* November 3, 1970 *opinion letter* signed by me." Shienbrood's affidavit also contains the following statement:

"The *FAA*, when considering its response to a request such as that made by American, is of course willing to hear the views of any interested party. Nevertheless, *the FAA opinion as formally rendered* is based on its own analysis of the agreement between the parties and on the applicable law and regulations as interpreted and administered by the *FAA*. That was the basis for the *formal opinion* letter . . . [sent to American]." (Emphasis added.)

Woodruff executed an affidavit on December 13, 1971 which was also submitted in the arbitration. He states that Gaddis told him on August 19, 1970 that "American expected to submit a written request to *the FAA* for a *formal opinion* on registration" and that he conveyed this information to AET's Washington attorneys. Woodruff further states:

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"After American's request was submitted to the FAA, and while the General Counsel's Office was considering its response to the request, Messrs. Shienbrood and Krassa consulted with our office and obtained our views with respect to the issues involved. Thereafter, on November 3, 1970, the FAA in Washington issued its opinion letter that the AET aircraft could not be registered in the United States. I received a copy of this opinion letter and, I believe, a copy was also sent to Mr. Babcock [an attorney for AET]." (Emphasis added.)

The Court's opinion is obviously based on a misapprehension as to the facts, or on conclusions reached with no information as to the facts other than the distorted views presented in AET's motion papers. If there is any doubt about the matter, the Court—before concluding that there has been "gross exaggeration" in counsel's description of the Shienbrood letter—should resolve the issue by receiving testimony from the FAA officials themselves.*

It is true, as the Court points out, that Shienbrood's letter does not state, *in haec verba*, that "the aircraft were not registrable". However, as demonstrated by the Shienbrood and Woodruff affidavits, that is exactly what the letter means: the Agreement

* The Court's opinion states that "TCA, aware of the Shienbrood letter, did not at any time advise the state court of such letter nor rely in any way on any impossibility of registration as affecting the requested stay of arbitration and declaratory judgment." (Op. at 6) The arbitration Demand sought only a declaration as to defaults and as to AET's "procedure" in terminating. There was no point in including in the stay motion arguments directed toward registration or remedies because no issues relating to these matters were referred to in the Demand. Both sides have always agreed that matters relating to remedies were not subject to arbitration, and impossibility of performance caused by nonregistrability is a remedies defense.

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did not constitute a conditional sales contract, TCA was therefore not the owner, and the aircraft could not be lawfully registered in TCA's name.

- (E) "TCA introduced into evidence [at the arbitration] the Shienbrood letter and three of its witnesses (including Gaddis) gave expert testimony that the aircraft were not lawfully registrable." (Op. at 8)

This statement is partially incorrect and proceeds upon an erroneous inference. At the arbitration hearing Gaddis was the only expert on registration who testified.* His testimony was introduced to explain what the registration issue was all about and to put in context his conduct and American's conduct in raising the registration issue in the summer of 1970. This was not done to have the arbitrators rule on registration per se, but because AET asserted in the arbitration that American's actions were attributable to TCA and that such actions demonstrated that TCA was not using best efforts. This is quite a different situation from the way the Court described it.

- (F) "After the hearings were concluded, TCA submitted a 'Post-Hearing Memorandum', dated September 29, 1972. This memorandum argued extensively that TCA could not lawfully register the aircraft." (Op. at 8)

The Court's conclusion is in error as to the argument purportedly made in TCA's Post-Hearing Memorandum. Apparently the Court has accepted the selected pages from the Memorandum which were attached as Exhibit M to the Saskor Affidavit of February 6, 1973 submitted in support of AET's

* Lempert testified, "I never thought of myself as an expert in this area. That is why I called Mr. Gaddis." (Tr. 3056) Overbeck testified, "I don't hold myself out as an expert on registration." (Tr. 3485)

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motion to dismiss. An examination of the Memorandum as a whole would demonstrate that TCA was not arguing the registration issue per se, but was attempting to explain how TCA's actions, in response to the registration problem, were reasonable and did not violate its best efforts obligation.

Exhibit M to the Saskor Affidavit contains the title page plus pages 37, 38, 39 and 55 of the Memorandum. Pages 37-39 describe the registration problem, but the Saskor Affidavit omits pages 40 and 41. (For the Court's information we attach pages 37-41 as an appendix.) The Court will note that page 41 concludes the discussion of the registration question by pointing out that no responsible legal officer of an airline, faced with this question in the summer of 1970, could have reasonably proceeded to accept delivery of AET's aircraft without first having the registration problem resolved. This was the argument made by TCA to the arbitrators, and it was made in order to show that American's actions (even if attributable to TCA) did not violate TCA's best efforts obligation. It was precisely because the registration question was so serious that American's attempt to resolve it was proper. It was this point, not the registration issue itself, which was argued in the pages referred to.

The Court will also note from the annexed pages that the discussion concerning registration was part "(3)" of what was a six-part section in the Memorandum. These parts, respectively, described the evidence as to TCA's conduct, American's conduct, the statute and regulations, American's application to the FAA, and AET's conduct, and then gave a summary. By selecting only a few pages from the Memorandum, the Saskor Affidavit distorts the context of the registration discussion and creates the erroneous impression that the registration question, as such, was submitted for decision to the arbitrators.

The Court mistakenly accepted this impression as fact, although that fact quite clearly is in dispute. On a motion for

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summary judgment, such disputed facts cannot be accepted or resolved, especially when as here the record is manifestly incomplete.

- (G) "AET argued extensively to the arbitrators that the aircraft were registerable. Among other things, AET pointed out that the Shienbrood letter was not controlling; that FAA counsel in Oklahoma City and 'FAA General Counsel's Office in Washington' had an opinion contrary to that of Shienbrood; and that the latter's November 3, 1970 letter was 'contrary to prior FAA opinions and contrary to then existing FAA practice'." (Op. at 8)

The Court misstates even AET's argument, at least in part. AET did argue that FAA counsel in Oklahoma City had given AET's Washington, D. C. counsel an "opinion" that the aircraft were registrable, although it is undisputed that this was a qualified oral opinion, based upon a brief review of the documents which were not complete and which were presented by Babcock, a young Reavis Pogue associate (who was totally unfamiliar with the complicated transaction) during a brief visit to Oklahoma City. It was this informal advice which Harlan of Eastern decided he could not rely on after checking with the Reavis Pogue firm. In fact, Woodruff, who allegedly gave this "opinion", stated in his affidavit that he told Babcock that "I could only give him an informal opinion on the question of registration and that a request in writing would have to be made for a formal opinion." Woodruff also stated that "as far as I know, AET did not at any time request a formal opinion on the registration issue." It was precisely such a "formal opinion" which American, after consulting with Woodruff himself, did request. Thus, if there has been any "gross exaggeration", it has been by AET.

As to the FAA General Counsel's office in Washington having an opinion "contrary to that of Shienbrood", there is no

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such opinion. As best we can piece together the source of this statement by the Court, it is based on AET's argument (see pages 56-57 of Exhibit N to the Saskor Affidavit of February 6, 1973) that, in AET's view, the General Counsel's office had issued *prior* rulings in *other* matters which were contrary to the ruling signed by Shienbrood in the AET-TCA situation. These "FAA opinions" (internal memoranda by or letters from the Oklahoma City office, reflecting in part the expression of views by the General Counsel's office) are manifestly not inconsistent with Shienbrood's letter of November 1970, since they dealt with completely different cases and different questions. In fact, they did not even relate to foreign aircraft or to foreign owners, which was the main problem here.

Nor was Shienbrood's letter contrary to "then existing FAA practices", as AET claimed. As Gaddis testified during the arbitration, the nonlawyer clerks at the FAA's local office in Oklahoma City had from time to time routinely processed leases-with-options-to-purchase. (It was precisely because of this haphazard and routine processing by clerical personnel that AET hoped to get its foreign aircraft registered.) But surely such processing did not constitute an "existing practice" of the FAA itself, especially with respect to foreign aircraft, and certainly such processing had not been sanctioned by the FAA in Washington.

The Court's statement of the situation makes it appear, and indeed the Court seems to believe, that there were at least two agency views contrary to the opinion signed by Shienbrood in connection with the AET-TCA Agreement. This is completely wrong. In fact, the Court fails to point out, in reciting AET's arguments at the arbitration, that AET also stated that its position

"... illustrates that the law on registration is not black and white. Indeed it confirms that there is no law on

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registration." (Saskor Affidavit of February 6, 1973,
Exhibit N at 57)

This statement by AET further shows that AET itself was not presenting the registration issue as such for decision by the arbitrators, but rather presented the arguments in support of its contention that TCA, by remaining silent throughout the summer of 1970 and by not asserting such arguments, had not exercised best efforts to get the aircraft registered.

We respectfully submit that the opinion is so colored by its mistaken conception of the facts and its criticisms so factually unfounded, that reargument should be granted. It is unjust, as well as erroneous, for this opinion to remain in its present form. Summary judgment should not be granted against American by resolving the numerous disputed facts and inferences without trial.

**II. THE COURT OVERLOOKED CONTROLLING PRINCIPLES OF
LAW WHICH PRECLUDE SUMMARY JUDGMENT IN THIS ACTION**

A. Registration

The Court's dismissal of the first three causes of action rests upon two premises: first, that the registration issue was submitted to the arbitrators and, second, that the "award necessarily decided the point against plaintiff." (Op. at 12) Both parts of this conclusion are incorrect and reargument is therefore necessary. Moreover, even if both premises were correct, such a decision by the arbitrators would have been a manifest disregard of federal law and policy and therefore not res judicata in either the state or the federal courts. The Court fails to meet this issue in dismissing the complaint.

First, as already explained, the FAA had ruled more than a year before the arbitration hearing that AET's foreign-owned

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aircraft were not registrable. Even before the FAA's ruling was issued, AET rejected American's invitation to confer jointly with the FAA and also refused to present its views to the FAA when invited by the FAA to do so. Nor did AET protest to the FAA when its ruling was issued, although the ruling itself showed that a copy was immediately sent to AET's counsel as well as to counsel for American. Thus, by the time the arbitration began, the federal agency charged with primary jurisdiction over the registration question had effectively decided the matter.

When the arbitration hearings began, TCA introduced into evidence the FAA opinion and explained the background of the registration question and the reason why the ruling was correct. AET claimed that the ruling was erroneous and presented various reasons which, AET asserted, TCA should have presented to the FAA in the summer of 1970. TCA's silence at that time was said to be a failure of its best efforts obligation to register the aircraft. But neither side asked the arbitrators to decide the registration issue itself. There is nothing in the arbitration award to establish that they did so, and the Court on this motion for summary judgment cannot resolve all factual inferences in favor of the moving party and, on an incomplete factual record, conclude that the issue as such was presented to the arbitrators for decision. This, however, is what the Court has done in granting summary judgment.

Second, the award did not "necessarily decide the point against" TCA. TCA's answering statement in the arbitration asserted that because the aircraft could not be registered it followed that AET's default claims were moot. The arbitrators found defaults, thus necessarily rejecting TCA's contention (at least for purposes of the arbitration) that the default claims were moot. This does not mean, however, that they disagreed with TCA's premise that the aircraft could not be registered. They may well have agreed or disagreed with the FAA on registration,

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or not dealt with the registration issue at all,* but nevertheless decided that TCA's conclusion as to mootness was wrong.**

The same logic applies to the denial of TCA's counterclaim in the arbitration. TCA stated that because the aircraft could not be registered, it was entitled to recover its downpayments and to a declaration that the Agreement was terminated and that it had no further obligations. The arbitrators denied the counterclaim, but again that does not mean that they disagreed with TCA's premise as to registration. They may well have accepted TCA's premise, but still disagreed with its conclusion that this meant it was entitled to recover its downpayment or was entitled to a declaration that it had no further obligations. The arbitrators' denial of the counterclaim cannot therefore be said to constitute a ruling, one way or the other, on registration.

Finally, the Court's opinion fails to deal with plaintiff's contention that, regardless of what the arbitrators decided, if federal law and public policy prohibit registration of the Irish aircraft and prohibit AET from tapping domestic air revenues in the guise of rents or damages in lieu of rents, then plaintiff is entitled to the requested declaration because the arbitrators could not decide a question contrary to federal statutory law. As the New York Court of Appeals emphasized in *Matter of Aimcee Wholesale Corp.*, 21 N. Y. 2d 621, 629-30, 237 N. E. 2d 223, 227, 289 N. Y. S. 2d 978, 974 (1968):

* AET itself argued that registration per se was irrelevant to the issues before the arbitrators, asserting in its prehearing memorandum that "TCA's attempt to raise the abstract issue of whether the aircraft is 'lawfully registrable in the United States' is a meaningless exercise which can have no bearing on this arbitration"

** An example will illustrate the point: suppose the claim in arbitration had been that because the IRA is killing British soldiers, all AET flights to New York should be prohibited. The denial of that claim would not constitute a finding that the IRA was not killing British soldiers.

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"We have often held that the broadest of arbitration agreements cannot oust our courts from their role in the enforcement of major State policies, especially those embodied in statutory form (*Durst v. Abrash*, 22 AD 2d 30, *affd.* 17 NY 2d 445, *supra* [usury laws]; *Matter of Knickerbocker Agency [Holz]*, 4 NY 2d 245 [liquidation of defunct insurance companies]; *Matter of Kingswood Mgt. Corp* [Salzman], 272 App. Div. 328 [claim under Federal Emergency Price Control Act of 1942]; see, also, *Wilko v. Swan*, 346 U. S. 427, *supra* [claim under Securities Act of 1933]; *Koven & Brother v. Local Union No. 5767, United Steelworkers of America*, 381 F. 2d 196 [3d Cir.] [scope of discharge in bankruptcy] . . . ; 8 Weinstein-Korn-Miller, N. Y. Civ. Prac., pars. 7501.15-7501.19). Recently, the Second Circuit in *American Safety Equip. Corp. v. Maguire Co.* (391 F. 2d 821) came to a conclusion similar to ours involving arbitration of a Federal antitrust claim (see, also, *Silvercup Bakers v. Fink Baking Corp.*, 273 F. Supp. 159, 162-163 [S. D. N. Y.] [dictum])."

Thus it is well established that arbitration awards cannot be contrary to the public policy of the state or of the federal government. See also *Union Tel. Co. v. American Communications Ass'n*, 299 N. Y. 177, 86 N. E. 2d 162 (1949). That would be the effect of the award if, as the Court has held, the award had determined that the aircraft were registrable. (This is also another reason why it cannot be presumed that the arbitrators made such a determination.)

However the Court chooses to characterize the Shienbrood letter, one thing is perfectly clear: the facts which are recited in Shienbrood's letter and which form the basis for the opinion are undisputed. We submit that even a perfunctory review of the policy and law relating to registration of aircraft establishes be-

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yond doubt that Shienbrood's conclusions were correct and that, as a consequence, AET's aircraft could not lawfully be registered and flown in U. S. domestic air commerce.

B. Termination and Causation

The Court dismissed the fourth cause of action (which it incorrectly describes as limited to the claim that AET had no right to terminate) on the ground that the arbitrators had already decided the same question. (Op. at 12)

First, the arbitrators did not decide that AET had a right to terminate the Agreement. In fact, both parties have always agreed that the right to terminate, as distinguished from the procedure followed, was a matter of AET's Section 9.2 remedies, and those remedies were excluded from the scope of arbitration both by the arbitration clause and by Justice Leff's decision. AET itself has made this distinction, as recently as December 12, 1973, when at page 21 of its brief to the Appellate Division on the pending appeal challenging confirmation of the award it stated,

"The question of 'remedy' would be whether respondent [AET] had the right to terminate under Section 9.2 of the Agreement, not whether it followed correct procedures in exercising this right. *Respondent did not submit this question to arbitration*, since its remedies are fixed by the Agreement and follow automatically upon an event of default. The relief requested was a declaration that in exercising this contractual right of termination, respondent followed the procedures prescribed in the Agreement." (Emphasis added.)

Thus AET's own brief, filed in the Appellate Division only last week, appears to construe the award as dealing merely with procedure for termination rather than with the substantive right

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to terminate. This is directly contrary to the construction placed on the award by this Court when it dismissed the fourth cause of action on the ground that the award determined that AET had a right to terminate.

Furthermore, the Court's opinion fails to recognize that the fourth cause of action is not limited to the claim that AET's termination was "improper and unconscionable." It also states that,

"Any loss of rentals or other payments or damages suffered by AET were self-inflicted, and resulted from its improper termination and not from any default by TCA."

In other words, the complaint alleges that AET's purported injury was not caused by TCA's defaults. Clearly this claim cannot be dismissed without a trial.

It appears that the Court has overlooked the fact that TCA immediately corrected the two alleged *de minimis* defaults upon which AET based its termination. As a consequence, AET could not possibly have suffered any damages even if those defaults occurred. Further, even if TCA had failed up until September 2, 1970 to exercise best efforts with respect to registration, AET had suffered no damages as a consequence of this failure at the time it terminated. It was AET, not TCA or American, which terminated the Agreement on September 2, 1970 and which refused to proceed after the \$85,000 payment and executed lease had been tendered. It was also AET which rejected American's invitation to confer with the FAA, which refused to have the registration issue resolved at a joint meeting with the FAA, and which told the FAA—prior to the issuance of Shienbrood's letter—that it did not wish to present its views to the FAA.

If AET had gone forward with the Agreement in September 1970 and if (as it claims) the aircraft could have been lawfully

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registered, AET need not have suffered any damage from the defaults found by the arbitrators. After AET terminated the Agreement there remained a period of more than two months until the first aircraft was scheduled for delivery; only then would the application to register have been made. Thus there was ample time to clear up the registration point if AET had not adamantly insisted on *not* clearing it up. Its damages, if any, have therefore been wholly self-inflicted and were caused by its failure to mitigate damages and by its continued insistence on keeping the Agreement terminated. Those damages were not caused by anything done by TCA or American, both of which were operationally ready and willing to proceed.

This is the basic causation argument of the fourth cause of action, and we submit that it was improper to dismiss without a trial.

AET's only defense to the causation argument seems to be its contention that it had a right to terminate on September 2 and was not obligated to go forward thereafter. Even if AET did have a right to terminate (which American disputes), its obligation to proceed thereafter and to mitigate damages is still an unresolved issue to be determined on trial. Moreover, if AET is in fact asserting that it has the right to collect \$13 million in rents under the Agreement even though TCA's defaults did *not* cause its injury, nothing establishes more unequivocally the fact that the damage provisions of the Agreement are in fact unenforceably penal in nature.

C. Punitive Damages

The Court dismissed the fifth cause of action, which alleges that the remedies in the Agreement are punitive in nature and hence unenforceable, on the ground that TCA warranted and represented in the Agreement that the remedies were not penal. (Op. at 13) We submit that the Court has misconstrued the

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Agreement and has overlooked controlling law which requires a contrary decision.

First, the Court is mistaken in basing its determination upon the language quoted from Section 11.2 of the Agreement, since that quoted language relates only to an alleged warranty "with respect to any such lease". The issue of punitive damages does not arise under a lease but under the Agreement; hence the quoted language is irrelevant to the point at issue.

Second, the Court's quotation from Section 11.3 of the Agreement omits the introductory words, "There is to its [TCA's] knowledge no law. . . ." The alleged warranty under Section 11.3 is therefore not absolute, and there is no factual proof on this record by which the Court can properly assume TCA's knowledge as to the illegality of the punitive damages provisions when the Agreement was executed in 1968. Hence, there is no undisputed factual basis for ruling that TCA is estopped by the alleged warranty from raising illegality as a defense.

Third, it is axiomatic that warranties cannot be enforced or used as the basis for estoppel if the party to whom the warranty is made is not misled or has as much knowledge of the matter warranted as the other party. If knowledge of the illegality of the punitive damages provisions is to be implied to either party, it must at a minimum be implied to both parties equally. *Brick v. Campbell*, 122 N. Y. 337, 347 (1890). In fact, such knowledge should be implied more strongly to, and construed more strictly against, the party which drafted the language in question. That party was AET. But obviously, this cannot and should not be decided on a motion for summary judgment.

Fourth, it is stretching the alleged warranty far beyond its words or meaning to say that TCA warranted that the damage remedies were not punitive or penal, since the alleged warranty referred only to "the execution, delivery or performance by TCA of the terms of this agreement. . . ." The question here refers

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not to TCA's performance but to AET's rights and remedies upon TCA's *failure* to perform. In other words, the question of whether the damages are punitive is beyond the scope of any reasonable construction of the alleged warranty clause.

Fifth, the scope of the warranty clause—quite apart from the other arguments mentioned above—is a mixed question of fact and law which cannot be resolved on a motion for summary judgment. Not only must all disputed facts be resolved *against* the moving party on a motion for summary judgment, but all inferences from such facts “must be drawn against the movant and in favor of the party opposing the motion.” *Adickes v. Kress & Co.*, 398 U. S. 144, 158-59 (1970); *First National Bank of Cincinnati v. Pepper*, 454 F. 2d 626, 629 (2d Cir. 1972); 6 Moore, *Federal Practice* ¶56.15[3], at 2337. Disputed issues of fact, for purposes of denying summary judgment, include disputes as to inferences to be drawn from documents. *Empire Electronics Co. v. United States*, 311 F. 2d 175, 179-80 (2d Cir. 1962); *Lemelson v. Ideal Toy Corporation*, 408 F. 2d 860, 864 (2d Cir. 1969); *Painton & Company v. Bourns, Inc.*, 442 F. 2d 216, 233 (2d Cir. 1971).

Sixth, the Court's opinion overlooks Section 13.8 of the Agreement, which provides that New York law is applicable to the Agreement and that any “provision . . . prohibited by or unlawful or unenforceable under any applicable law of any jurisdiction shall as to such jurisdiction be ineffective. . . .” Thus the Agreement by its own terms invalidates AET's remedies if they are unenforceable under New York law, or under any other law. It removes such remedies—if unlawful—from the scope of any alleged warranty and makes it possible for American or TCA to raise illegality as a defense even if, as the Court believes, the warranty would otherwise apply. Thus, Section 13.8 alone invalidates the Court's conclusion.

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Finally, if the damage clause is penal, as American contends, it cannot be enforced by the Court—warranty or no warranty. Under controlling New York law, punitive damages are judicially unenforceable. This is true regardless of whether the parties have agreed to them in a contract. In fact, the rule precluding enforcement assumes that such damages have been agreed to in the contract. It adds nothing that they were or were not warranted to be legal, since neither a contractual warranty nor an agreed upon damage provision can make legal what is illegal.* Thus a defense of illegality cannot be waived by private parties, for to ignore the defense would place the Court in the untenable position of enforcing an illegal claim. See *Brick v. Campbell*, 122 N. Y. 337, 346-47 (1890); *Levin v. Levin*, 253 App. Div. 758, 300 N. Y. Supp. 1042 (2d Dep't 1937); 17 Am. Jur. 2d, *Contracts* § 232, at 613 (1964).

For all these reasons, the fifth cause of action cannot be dismissed.

D. Registration "Procedure"

The Court dismisses the first three causes of action on a further ground, holding that "TCA may not assert as against AET that the aircraft could not be lawfully registered" because (1) the Agreement provided certain "procedure for securing registration and the consequences if such procedure did not result in registration", and (2) the "procedure provided for securing registration was never followed because of the defaults of TCA." (Op. at 13-14) We submit that the holding is incorrect.

* Consider, by comparison, a loan agreement which calls for a usurious rate of interest but in which the borrower warrants that the interest rate is legal. Under the Court's rationale, the borrower could not challenge the interest rate as illegal and the Court would have to enforce the loan agreement and usurious rate. This is incorrect.

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First, if as alleged in the complaint registration of foreign aircraft is unlawful, then it would violate public policy to permit a foreign airline to collect as damages precisely what federal law prohibits it from collecting as rents for leasing its aircraft in this country.* American cannot be prevented from asserting this position in the present case, regardless of the terms of the Agreement. As explained above in section "C", the Court's reasoning would permit defendant to enforce an Agreement in a manner contrary to public policy. Obviously this is error.

Second, Section 13.8 of the Agreement, as previously explained (as well as Section 18.1 of the Lease form) states that any provision prohibited by or unlawful or unenforceable under any applicable law of any jurisdiction shall as to such jurisdiction be ineffective. Thus if federal law makes it unlawful to register these foreign-owned aircraft, the requirement that such aircraft be registered—even if the Court reads into the Agreement or into the Lease form that there is such a requirement—is negated by the terms of the Agreement itself. No one, in any event, can be penalized for not attempting to perform an illegal act. Thus the basic question of the legality of registration remains, and the terms of the Agreement itself refute the conclusion reached by the Court.

Third, wholly apart from the questions of illegality and public policy and Section 13.8, the Agreement does not support the Court's analysis. Except to require TCA to use best efforts, the Agreement set out no procedure for securing registration. The

* Suppose, for example, in the usury hypothetical discussed in the prior footnote, that the loan agreement provided that in the event of a default, the lender would be entitled to liquidated damages in an amount equal to principal plus the usurious interest. Clearly the lender would not be entitled to recover in the guise of liquidated damages that which he could not obtain under the agreement itself.

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first seasonal lease (which was executed and tendered to AET immediately after AET terminated) was of course one of the documents to be submitted with the registration application, but it was not in any true sense part of the registration procedure. TCA could not have attempted to register the aircraft until November 1970, after delivery of the plane from Boeing to AET, at which time it would have submitted to the FAA the bill of sale or title document, the executed lease, and the aircraft registration application. Within a few days after termination on September 2, 1970, TCA *had* tendered the executed lease and, as it testified at the arbitration, was fully prepared to have proceeded with the submission of the required documents in November. Thus the Court's statement that the procedure for registering "was never followed because of the defaults of TCA" and that the "lease was never executed by TCA" and that TCA "never used 'its best efforts to register the aircraft'" is inaccurate. The procedure for registration was never followed because AET terminated two months before the procedure could have been followed.

Finally, TCA's defaults as of September 2, 1970—no matter how serious they may have been—would in no way have caused a failure of registration in November 1970. The defaults for which AET terminated in September (delayed payment of \$85,000 and delayed tender of the first lease) were cured within a few days after the termination. And regardless of TCA's purported failure to use best efforts *prior* to September 2, 1970, if AET had not thereafter insisted on keeping the Agreement terminated, the aircraft could have easily been registered in TCA's name when ready for delivery—assuming, of course, that registration was lawful. Instead, AET blocked the matter from going forward simply because it objected to the method by which American (not TCA) had raised the registration issue. But if American was wrong, AET could quickly and

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simply have demonstrated American's error and the Agreement would have gone forward.* It is not only illogical but unjust to take the position that TCA prevented the Agreement from proceeding when it is undisputed that AET is the party which terminated the Agreement and that it did so on the flimsiest of excuses without permitting the defaults to be cured.

E. Discretionary Dismissal

The Court's opinion also declines jurisdiction over this action on discretionary grounds, stating that the "action seems plainly a device and stratagem of TCA to stall or delay the pursuit by AET of its remedies for the established defaults of TCA." (Op. at 15) Since the action does no more than seek a prompt adjudication of AET's rights to those very remedies, it is unclear how the action can be characterized as a device "to stall or delay". Indeed, AET itself subsequently commenced a companion action, 73 Civ. 2933, which involves the same basic dispute—the question of AET's remedies. We submit that under these circumstances, the instant action was entirely proper, "the action should be entertained and the failure to do so is error." *Broadview Chemical Corp. v. Loctite Corp.*, 417 F. 2d 998, 1001 (2d Cir.), *cert. denied*, 397 U. S. 1064 (1969).

* In fact, throughout the month of September 1970, TCA and American went ahead with the huge spare parts and maintenance planning which was necessary in order to take delivery of the aircraft in November. It is incredible that AET could continue to insist on termination and then try to hold TCA or American responsible as if one of them, rather than AET itself, had brought the Agreement to an end.

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CONCLUSION

For the reasons stated above, plaintiff respectfully submits that reargument should be granted, the Court's opinion and order withdrawn, and the motion to dismiss denied.

Dated: New York, New York
December 21, 1973

Respectfully submitted,

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* * *

(Gaddis testified that in his opinion it would have been "irresponsible" for American not to have done so (Gad. 4578), and both Wallace (W 3749-50) and Harlan (H 2698) said that, under the circumstances, it was the proper course of action.) What Overbeck and Lempert could not have anticipated was AET's almost irrational response of terminating the entire Agreement, refusing any further comment to the FAA, and thus preventing any joint consideration of the issue.

(3) *The Statute and Regulations.* The registration requirement is found in Section 501 of the Federal Aviation Act, 49 U. S. C. § 1401 (Ex. 46), which makes it unlawful to operate an aircraft in the United States unless it is registered by the owner, and the owner must be a United States citizen. Under Section 47.5(c) of the Regulations (Ex. 47), the term "owner" is defined to include a lessee of an aircraft under a contract of conditional sale.

A basic part of the legislative policy behind the registration requirement is known as the principle of "cabotage" (L 2784-89) (Gad. 4507-08). It originated in maritime law and, simply stated, is that foreign-owned aircraft cannot fly between "capes" or points in the same country. The same principle underlies Section 1108 of the Federal Aviation Act, 15 U. S. C. § 1508, which was discussed in the letter from Eastern's counsel referred to in the footnote on p. 31, *supra*. See *Petition of Qantas*, 29 Civil Aeronautics Board Reports 33 (1959); Kingsley, *Nationality of Aircraft*, 3 Journal of Air Law and Commerce 50, 51 (1932); Convention on International Civil Aviation (Chicago

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Convention), December 7, 1944, Art. 7, 61 Stat. 1182;* cf. *Central Vermont Transportation Co. v. Durning*, 294 U. S. 33, 41 (1935) ("long established national policy to restrict . . . foreign control of coastwise shipping"); *Marine Carriers Corp. v. Fowler*, 429 F. 2d 702 (2d Cir. 1970) ("Like all maritime nations . . . the United States treats its coastwise shipping trade as a jealously guarded preserve").

The TCA-AET lease arrangement ran directly contrary to the cabotage principle, since an aircraft owned by a foreigner, AET, would have been flying on TCA's U. S. cabotage routes. By this method AET, a foreign carrier, would have been using domestic commerce (through receipt of rent from TCA) to finance the purchase of its aircraft (L 2786-88, 2872-73). Indeed, the rental to be paid by TCA was based directly on the payments of AET's depreciation and capital charges for the aircraft (Gl. 37-38, 176-177) (M 922-23) (Ex. B1).

The unrebutted testimony of Gaddis, as well as the FAA opinion (Ex. 48), demonstrate that TCA could not lawfully register the aircraft because it was not purchasing them under a conditional sales contract. The payments (that is, rentals) which TCA was obligated to make were not "substantially

* Article 7 of the Chicago Convention specifically relates to "cabotage" and provides, in part, that "each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory." More than 120 nations, including Ireland and the United States, have signed the Convention.

Murdoch, after much dodging (M 5496-508), conceded that he had known the principle for at least ten years (M 5508-09). Gleeson also knew the principle (Gl. 196). So did O'Sullivan (O'S. 384). So, we believe, did Dargan (Ex. 2) (Gl. 201). In short, AET officials, as might be expected of an international airline, were well aware of the fundamental problem.

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equivalent" to the value of the aircraft (that is, the rentals plus the option price) (Gad. 4487-93). The option price was not nominal, as required by the Act and common law (Gad. 4491, 5177), but was 115% of the cost of a new and different aircraft.

In addition, the Agreement was not a financing transaction intended to achieve the purchase of a chattel (LJ 1701-03) (Gad. 4496); the rental payments were not credited towards the purchase price but instead were added to the total cost the lessee would be required to pay in order to purchase the plane (L 2864-66) (LJ 1704); the value of the plane to be purchased was determined not on the basis of that plane but on the basis of a new and totally different aircraft (L 2864, 3311-12); and the seasonal nature of the lease did not conform to the ordinary conditional sale under which the vendee acquires complete possession of the item being bought (L 2847-48) (O 3504-05). In short, the Agreement was just not a conditional sales contract in law or in purpose, and TCA, the U. S. lessee, was not in fact and truth the owner. The true owner at all times was AET, a foreigner.

That the option may have been "genuine"—in the sense that anyone willing to pay the exorbitant price could exercise the option—did not transform the lease into a conditional sales contract (Gad. 4973-77), as AET continually urged at the hearing. Nor did the fact that under some extraordinary circumstances TCA might have found it advantageous to exercise the option make it a conditional sales contract. TCA was to rent—not purchase—the aircraft. The option, both in fact and purpose, was a "sham".

In determining whether the lease with the option was equivalent to a conditional sales contract within the statute, Gaddis testified that the subjective intent of the parties was not relevant (Gad. 4441, 4463-64, 5047) (see L 2869). The Agreement

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had to be judged on its objective facts and on what it itself revealed as to the parties' intention. Subjective intent was relevant, however, in determining whether the transaction would result in an invalid registration under Section 47.43 of the Regulations (Gad. 4441, 5048-49) (Ex. 47). It is clear that the option was inserted in the AET-TCA Agreement solely to avoid the registration requirement. As demonstrated by a 1968 letter opinion issued by the FAA's Oklahoma City office (Ex. AY, page 2), this put the matter squarely in the bull's-eye of Section 47.43(a) (4); and neither Overbeck nor Lempert, nor Harlan nor Wallace, nor Gaddis—nor any responsible legal officer of an airline—could proceed without having that question resolved.

As a practical matter, an airline the size of American or Eastern—with so many irons in the fire at the FAA, at the CAB, and elsewhere—could no more afford to fly an invalidly registered foreign aircraft on its domestic routes than it could afford to make a few "moonlight" flights over unauthorized routes. Because of the enormous expense involved in preparing to operate 747s, and the expense and disruption that would occur if the plane once in operation were grounded, it would have been foolhardy for a legal officer of such an airline to proceed until the question was definitely resolved.

(4) *American's Application To The FAA.* At American's request Gaddis prepared a letter to the FAA (Ex. 54), and brought it with him to New York on August 20 (O 3359). Although Overbeck thought Gaddis' letter "was correct in all respects" (O 3372), he made a few changes on the second and

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**Defendant's Memorandum in Opposition
to Motion for Reargument**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

**DEFENDANT'S MEMORANDUM IN OPPOSITION
TO MOTION FOR REARGUMENT**

Plaintiff has moved for reargument of defendant's motion to dismiss this action (defendant's said motion for dismissal having been treated as a motion for summary judgment, and having been granted by this Court's decision of December 14, 1973). In support of its motion for reargument, plaintiff has submitted a 36 page Memorandum with a five page appendix. Plaintiff's Memorandum relies heavily on new alleged "facts" which were not before the Court on the original motion. In a letter of December 28, 1973 in "amplification" of a portion of its memorandum, plaintiff has set forth further new "facts" which were not before the Court on the original motion.

Defendant opposes the motion for reargument on the following grounds:

- (1) The motion is improper in the form submitted, since it relies on new alleged "facts" which were not before the Court on the original motion (all of which "facts" were available to plaintiff at the time of the original motion).
- (2) Plaintiff has not shown that in rendering its thoughtful and detailed decision of December 14, 1973, the Court overlooked any controlling facts or principles of law.
- (3) Even if plaintiff were entitled to bring before the Court the new "facts" cited in its Memorandum, and even

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if all or some of these new "facts" were accepted, such new "facts" would not require a change in the Court's decision.

POINT I

PLAINTIFF'S MOTION FOR REARGUMENT IS IMPROPER IN ATTEMPTING TO RELY ON NEW ALLEGED "FACTS" WHICH WERE NOT BEFORE THE COURT ON THE ORIGINAL MOTION.

It is well settled that a motion for reargument must be based on the papers which were before the Court on the original motion. No new facts may be brought before the Court on a motion for reargument. This would appear to be the reason for the statement in Rule 9(m) of the General Rules of this Court that on a motion for reargument "no affidavits shall be filed by any party unless directed by the court." Presumably this is also the reason for the rule that the papers submitted in connection with an unsuccessful application for rehearing are not part of the record on appeal. See *Petition of Pahlberg*, 2 F. R. D. 533 (S. D. N. Y. 1942); *Grame v. Mutual Assurance Society*, 154 U. S. 676 (1881).

We have been unable to find any Federal cases directly in point on this issue. However, the requirement in Rule 9(m) that the moving party on a motion for reargument shall serve a memorandum setting forth "the matters or controlling decisions which counsel believes the court has overlooked," indicates that the scope of a motion for reargument under Rule 9(m) is the same as under New York practice. See *Mount v. Mitchell*, 32 N. Y. 702 (1865); *Marine Nat'l Bank v. Nat'l City Bank*, 59 N. Y. 67, 73 (1874).

Under New York practice, a motion for reargument must be based upon the same facts which were before the Court on the original motion. *Parnett v. Concord Hotel, Inc.*, 9 A. D. 2d

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767, 192 N. Y. S. 2d 521 (2d Dept. 1959); *Public Service Com'n v. Grand Central Cadillac Renting Corp.*, 53 N. Y. S. 2d 202 (Sup. Ct., N. Y. Co. 1944) (not officially reported), rev'd on other grounds, 273 App. Div. 595, 78 N. Y. S. 2d 550 (1st Dept. 1948); *Franklin Nat'l Bank v. Briskman*, 202 N. Y. S. 2d 584 (Sup. Ct., Nassau Co. 1960) (not officially reported).

Plaintiff's supporting Memorandum is in direct violation of the foregoing principle. While plaintiff has submitted no affidavit in support of its motion, its Memorandum constitutes an apparent attempt to get new facts before the Court. That these new "facts" are not presented in affidavit form, does not cure this fundamental defect in plaintiff's papers.

The inappropriateness of plaintiff's attempt to introduce and rely on new "facts" is here heightened by the following: (a) all of these new "facts", which relate either to events which took place in 1970 or to matters which took place during the arbitration hearing, were available to plaintiff at the time of the original motion; and (b) plaintiff had ample opportunity to present these alleged facts to the Court if it was so inclined. On the return of the original motion, plaintiff requested and secured a three week adjournment of the motion. When the motion was argued, plaintiff requested and secured permission to file additional papers in response to any reply papers served by defendant. Plaintiff subsequently took advantage of such permission. Having lost the motion, plaintiff is not free to start over from scratch.

It is submitted that the following statement from *Public Service Com'n v. Grand Central Cadillac Renting Corp.*, *supra*, 53 N. Y. S. 2d at 203-204, is equally applicable to the present motion for reargument:

"The question presented by this application is whether the party moving for reargument can by sheer defiance and violation of the settled rule on the subject get before the court matter not before it and considered on the

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original application by the simple device of incorporating in the moving papers and physically attaching thereto the improper and objectionable matter and thus circumvent the rule that reargument must be had on the same record on which the motion was decided (*Wright v. Terry*, 24 Hun 228), and thus upon appeal, in the event upon reargument the court adheres to its original decision, get before an appellate court, by indirection, matter which it could not get before the court below, directly. That is what has been attempted here."

As to the substance of the new "facts", the following observations are appropriate:

(a) All of these new "facts" are in fact *old* "facts" which were submitted to the arbitrators for their determination.

(b) As to all or most of such "facts" as presented in the arbitration, evidence was introduced by the defendant herein to contradict these alleged facts. The arbitrators—three experienced trial lawyers—who were able to judge the demeanor of the witnesses and the totality of the evidence presented during the thirty days of hearing, apparently chose to believe respondent's witnesses and to disbelieve plaintiff's witnesses.

(c) Finally, in some cases the alleged "facts" are simply inaccurate.

In the final section of this memorandum, there will be pointed out to the Court some of the respects in which plaintiff's new "facts" are inaccurate and some of the respects in which contrary evidence was available to the arbitrators.

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POINT II

PLAINTIFF HAS FAILED TO SHOW THAT THE COURT OVERLOOKED ANY CONTROLLING FACTS.

By plaintiff's own admission, its motion for reargument is based on the contention that in setting forth some of the background facts in its decision, the Court relied on "mistaken or controverted facts" (Plaintiff's Mem. p. 2). Assuming for the sake of argument that this were so, this would not provide a sufficient basis for a motion for reargument. A showing more substantial than the natural desire of "the unsuccessful counsel . . . to again argue the very questions he had already submitted. . ." is required for the granting of a motion to reargue. *Fosdick v. Town of Hempstead*, 126 N. Y. 651, 652, 27 N. E. 382 (1891).

The test is whether the Court "overlooked" any controlling facts. General Rules, Rule 9(m). There is no assertion that the Court overlooked any controlling facts which were before it on the original motion, and the Court's detailed recitation of the facts in its decision shows clearly that it did not.

As to any contention that the Court overlooked alleged facts which were not brought to the Court's attention at the time of the original motion, it suffices to note that this is of plaintiff's own doing. Plaintiff chose what alleged facts to present to the Court. Having lost the motion, it is too late in the day for plaintiff now to contend that other alleged facts—fully available to plaintiff at the time of the original motion—were pertinent to that motion. If plaintiff's strategy were permitted there would be no end to litigation. Any litigant would be free to make a selective presentation of facts to the Court, keeping in reserve other facts to use as ammunition in the event the Court's ruling were unfavorable. It is to prevent just such strategy that the rule has evolved that a decision is *res judicata* on all issues which were presented or might have been presented to the Court.

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POINT III

PLAINTIFF HAS FAILED TO SHOW THAT THE COURT OVERLOOKED ANY CONTROLLING PRINCIPLES OF LAW.

Plaintiff argues that the Court's decision "fails to meet," and fails "to deal with," the contention that if the arbitrators did decide the registration issue plaintiff is nevertheless entitled to the requested declaratory relief because the arbitrators had no power to deal with this issue and their determination was contrary to federal law and public policy (Plaintiff's Mem. pp. 19, 22).

Plaintiff argued the registration issue extensively on the motion to dismiss. No other issue was the subject of such thorough treatment and such aggressive advocacy on the part of plaintiff. Plaintiff's position on this issue was obviously thoroughly considered by the Court and rejected. That the Court did not expressly mention plaintiff's "public policy" argument is perhaps attributable, more than anything else, to the Court's appraisal of the proper weight that should be accorded this argument.

The following statement of the New York Court of Appeals in *Fosdick v. Town of Hempstead*, *supra*, 126 N. Y. at 653, is apposite:

"The counsel now asks for a reargument simply because he desires to present further views upon the same question which has been already, and after full argument, carefully considered and decided by us. It is a mistake for counsel to assume that any particular portion of his argument, which has not been the subject of express reference in the opinion, has been overlooked. It is scarcely possible within the bounds of an ordinary opinion to meet and answer every argument which has been made by counsel orally or which may be in his brief."

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It is an interesting sidelight—but also a matter of considerable concern to defendant—that plaintiff is following the same strategy with respect to this Court's decision which it followed in connection with the arbitration award, where it argued both to this Court and to the Appellate Division of the New York Supreme Court that the arbitration award's "silence" on the registration issue meant that the arbitrators did not decide the issue even though it was presented to them. On oral argument before the Appellate Division, held this week on January 2, the defendant herein argued that this Court's decision was *res judicata* on several of the issues which plaintiff had raised on appeal, including appellant's argument that if the arbitrators did decide the registration issue that determination was contrary to federal law and public policy, and beyond the arbitrators' power. In rebuttal, plaintiff took the position that because this Court did not expressly mention this "public policy" argument in its decision, the Court did not decide this issue and its decision is not *res judicata* thereon.

In the light of past experience, it is not unreasonable to assume that, given the opportunity, plaintiff will continue to take this position on any further appeal in the State Court and in related actions where this Court's decision may have some bearing. While the Court has no obligation to do anything more than rule on the issues, if any, presently before it on the reargument motion, it is respectfully submitted that under the foregoing circumstances it would further the administration of justice if this Court in deciding the reargument motion were to expressly state the obvious, namely, that in rendering its decision of December 14, 1973 the Court did consider—and reject—plaintiff's "public policy" argument. This would also serve to preclude any possible misinterpretation of this Court's decision on appeal, if the decision is appealed.

Wholly apart from the other reasons why the registration and "public policy" argument is not available to plaintiff, as discussed

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in the Court's decision, the Court was fully justified in rejecting plaintiff's "public policy" argument on the merits. Plaintiff's argument that the aircraft were not lawfully registrable in the United States is bottomed on the FAA letter of November 3, 1970. The Court's interpretation of that letter is correct. The term "formal opinion" which plaintiff attaches to the FAA letter is a meaningless term. There is no provision in either the FAA regulations or the Administrative Procedure Act, 5 U. S. C. Sec. 500 *et seq.*, for the issuance of opinions, formal or otherwise (other than a reference to opinions rendered "in the adjudication of cases," 5 U. S. C. Sec. 552(a)(2)(A)).

Giving the FAA letter the benefit of every doubt, the most that it could be is what has sometimes been referred to as an "advisory opinion." See Davis, *Administrative Law*, Sec. 4.09 (1958). Advisory opinions do not constitute "rulings." They are not binding on the agency itself, or on the courts. See *North American Van Lines v. United States*, 277 F. Supp. 741, 746 (N. D. Ind. 1967), where the court noted that an advisory opinion issued by the Director of the Bureau of Motor Carriers of the Interstate Commerce Commission "was in no way the act of the Commission."

The consideration which may be accorded an advisory opinion or other agency interpretation by a Court was considered by the United States Supreme Court in *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944), where the Court stated:

"The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control."
(Emphasis added.)

Applying the Supreme Court's criteria to the FAA letter, it is clear that the letter falls short in several respects, particularly

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in the test of "consistency with earlier and later pronouncements." The FAA's letter ran contrary to long standing FAA practice under the Federal Aviation Act and contrary to prior FAA opinions (including a verbal opinion given by FAA counsel at the FAA Aircraft Registry in Oklahoma City in July 1970). Considering this fact, and the unusual circumstances under which the FAA's letter was written, the letter is entitled to no weight. See *Rochester Park, Inc. v. City of Rochester*, 38 M. 2d 714, 238 N. Y. S. 2d 822 (Sup. Ct., Monroe Co. 1963), *aff'd* 19 A. D. 2d 726, 241 N. Y. S. 2d 763 (4th Dept. 1963); *United States v. Alabama R. R. Co.*, 142 U. S. 615 (1892); *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294 (1933).

Moreover, plaintiff waived any right to object to the arbitrators' consideration of the registration issue or to contend that their determination of that issue was contrary to public policy, by affirmatively submitting that very issue to the arbitrators for determination. Cf. *Nat'l Cash Register Co. v. Wilson*, 8 N. Y. 2d 377, 208 N. Y. S. 2d 951 (1960). In this connection, plaintiff's reliance on *Matter of Aimcee Wholesale Corp.*, 21 N. Y. 2d 621, 289 N. Y. S. 2d 978 (1968) is misplaced, since in *Aimcee* the party objecting to the arbitrators' consideration of antitrust issues (a) raised this objection prior to the arbitration, and (b) was not the party who had submitted such issues to arbitration.

Even if there were no waiver, the arbitrators' determination of the registration issue would still be binding. Plaintiff's "public policy" argument seeks to rely on, and considerably extend, the narrow principle that an arbitration award may be vacated where it either (a) has the effect of rendering the underlying agreement illegal, or (b) directs or requires the doing of an act prohibited by law or offensive to public policy. See *Nat'l Equipment Rental Ltd. v. American Pecco Corp.*, 35 A. D. 2d 132, 314 N. Y. S. 2d 838, 841-842 (1st Dept. 1970). Neither of these situations obtains here.

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POINT IV

EVEN IF PLAINTIFF WERE CORRECT IN ITS CHARGE OF FACTUAL ERRORS, SUCH ALLEGED FACTUAL ERRORS WOULD NOT REQUIRE A CHANGE IN THE COURT'S DECISION.

While plaintiff argues extensively that the Court was mistaken in some of the factual statements set forth in the Court's recitation of the background of this matter, the Court's decision is not based on any of these supposedly mistaken factual assumptions. Rather, it is based on the Court's interpretation of three documents: (1) the Agreement; (2) plaintiff's Answering Statement in the arbitration; and (3) the arbitration award.

These three documents are the "uncontroverted facts." If plaintiff feels that the Court's interpretation of these documents is wrong, this is a matter to be raised on appeal.

POINT V

PLAINTIFF'S NEW FACTUAL ASSERTIONS WERE MADE IN THE ARBITRATION AND DETERMINED ADVERSELY TO PLAINTIFF.

As heretofore noted, the new alleged "facts" cited in plaintiff's memorandum either are inaccurate or consist of factual assertions which were made in the arbitration and not accepted by the arbitrators. Some of the more glaring examples are set forth below:

1. *The contention that plaintiff's conduct on the registration issue was prompted by Eastern* (Plaintiff's Mem. pp. 3-6). Plaintiff implies that it went to the FAA because of Eastern. In the arbitration, plaintiff flatly contended, not only that Eastern had raised the registration issue, but that Eastern had demanded that plaintiff secure an FAA opinion on registration. This contention was effectively shot down by an affidavit and subsequent testimony of Mr. Harlan's subordinate, William M. Wallace (Tr.

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3725-3771), who actually made the phone call to plaintiff, and who recalled quite clearly that he had asked plaintiff to secure an opinion of counsel, not an FAA opinion. Indeed, Mr. Wallace noted that in his discussion with Mr. Harlan they had decided that no inquiry should be made to the FAA. Moreover, Mr. Wallace stated in his affidavit (which affidavit he several times affirmed in his testimony) that he may have specifically asked plaintiff *not* to go to the FAA, but that he was not sure on this point.

2. *Contacts with Gaddis.* Plaintiff contends that Gaddis became involved "almost by accident," and that plaintiff had telephoned Gaddis on July 15 "to discuss unrelated matters" (Plaintiff's Mem. p. 7). In fact, Lempert testified in the arbitration that he had "two reasons for calling [Gaddis]," one being the transfer of registration, "and I also wanted to talk to him about the conclusions that I had drawn with respect to the Irish-TCA lease" (Tr. 2628-2629).

3. *The contention that FAA Counsel in Oklahoma City suggested that plaintiff make its application to Washington* (Plaintiff's Mem. pp. 8-10). As noted by plaintiff, Mr. Gaddis testified in the arbitration hearing that the reason he applied to Washington rather than Oklahoma City for an opinion was because this had been suggested by Mr. Woodruff, Assistant FAA Counsel in Oklahoma City. This contention was flatly contradicted by an affidavit of Mr. Woodruff which was prepared and submitted by plaintiff in the arbitration. In that affidavit (prepared some six months prior to Gaddis' testimony), Mr. Woodruff stated (Ex. 108, p. 4):

"On August 19, 1970, Mr. Gaddis advised me that American expected to submit a written request to the FAA for a formal opinion on registration. *He indicated that the request would be made to the office of the FAA General Counsel in Washington. . . .*" (Emphasis supplied.)

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4. *The contention that the FAA letter constitutes "a formal ruling"* (pp. 10-12). The inaccuracy of plaintiff's description of the FAA letter has already been discussed in an earlier section of this memorandum. As to the affidavits of Mr. Shienbrood and Mr. Woodruff, it suffices to note that the affidavits (or the wording thereof) were not prepared by the affiants but by plaintiff.

5. *The Contention that only one of plaintiff's witnesses purported to give expert testimony on the registration question* (pp. 12-13). Plaintiff contends that "Gaddis was the only expert on registration who testified." Among plaintiff's witnesses in the arbitration, Gaddis may have been the closest thing to a true "expert." However, the fact is that two of plaintiff's other witnesses, Mr. Harlan and Mr. Lempert, although testifying in part on other matters, also purported to give expert testimony on the registration issue. In the case of Mr. Harlan, the following excerpts from his testimony are pertinent:

"Direct Examination by Mr. Hartzell:

"Q. Mr. Harlan, what is your position?

"A. I am Senior Vice President Legal Affairs of Eastern Air Lines.

"Q. And how long have you held that position, approximately?

"A. With that title, since 1969. Before that I was Vice President of Legal Affairs.

"Q. And how long——

"A. Since——

"Q. And how long have you been with Eastern Air Lines?

"A. Since 1967.

"Q. And in similar legal capacity, throughout that period?

"A. Yes.

"Q. And prior to that time——

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"A. I was with the Atlanta law firm which was general counsel for Eastern Air Lines for about twenty-five years before that.

"Q. And did you work in the airline field, in your legal practice?

"A. Almost exclusively.

* * *

"Mr. Saskor: Is this man being brought in as an expert witness?

"Mr. Hartzell: Both. * * *

* * *

"Mr. Amabile: You are asking him now as an expert, as to whether those registrations were proper.

"Mr. Hartzell: Yes.

"Mr. Amabile: He is an expert based on the qualifications he has given.

"Mr. Hartzell: Yes.

* * *

"Q. I would like—maybe it would clear things up if you would tell the Arbitrators not what your conclusions were about the statute regulations in 1970, but what you knew was in the statute and regulations in 1970.

"Mr. Amabile: I would rather hear his conclusions because he's here as an expert."

In the case of Mr. Lempert, although the defendant herein several times objected to his qualifications as an expert (Tr. 2832, 2856), nevertheless Mr. Lempert pontificated at length on the "law" of registration (Tr. 2779-2951). It was through this witness, not Mr. Gaddis (who testified later) that plaintiff introduced the statute and regulations, and through this witness that plaintiff's position on the registration issue was presented to the arbitrators. At the end of the first day of Mr. Lempert's "expert" testimony,

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the following colloquy took place between the arbitrators and plaintiff's counsel (Tr. 2875):

"Mr. Amabile: Are you through with the regulations?

"Mr. Hartzell: No. Not by any means have I started on the regulations.

"We have only gotten into the statute."

6. *The contention that there was no reason to raise the registration issue as a ground for staying arbitration* (p. 12, fn.). In a footnote, plaintiff contends that there was no reason to raise the registration issue on its motion to stay arbitration "because no issues relating to [registration or remedies] were referred to in the Demand." One of the issues of default specified in defendant's demand for arbitration was the question of whether plaintiff had failed to use best efforts to secure all required registrations with and approvals of government agencies. The only registration required under the Agreement was registration of the aircraft with the FAA. If plaintiff felt that registration of the aircraft was unlawful, and that the arbitrators had no power to pass on the question of registration, plaintiff had a very good reason to raise this question on its motion for a stay of arbitration, and it was incumbent upon plaintiff to do so.

7. *The contention that plaintiff did not argue the registration issue per se in its Post-Hearing Memorandum* (pp. 13-15). Plaintiff refers to certain "omitted" pages of its Post-Hearing Memorandum to support its thesis that it "was not arguing the registration issue per se" but only in connection with the question of best efforts. This contention is effectively destroyed by: (1) plaintiff's Answering Statement in the arbitration, which together with defendant's demand framed the issues for the arbitrators and which was never amended or withdrawn by plaintiff; and (2) the following concluding statements in the same Post-Hearing Memorandum (p. 55):

"AET's virtually conceded purpose in terminating, was and is to obtain from TCA, as damages under the

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Agreement, the rents it could not lawfully have obtained under the lease because the aircraft could not be registered in the United States. AET seeks a ruling in this arbitration that the termination was authorized, in order to use that ruling in court as a basis for claiming damages. Such a ruling for AET cannot possibly be justified. Furthermore, the result AET seeks would violate the registration and cabotage principles, since AET would be obtaining indirectly as damages what it could never have lawfully obtained as rent.

* * *

"Because AET wrongfully terminated the Agreement, TCA is entitled to a refund, with interest, of its advance payments of \$335,000. * * *

"In the alternative, TCA is entitled to the same relief, without interest, pursuant to section 13.1 of the Agreement and paragraph (6) of Letter Agreement No. 1, since, as stated in the FAA opinion of November 1970 (Ex. 48), the foreign-owned aircraft could not lawfully be registered in the United States."

Perhaps at this point plaintiff, anticipating its declaratory judgment action, was already trying to fudge the issue. After its chief expert witness had proved to be a bomb, and after the machinations of its top officers had been brought out in the arbitration, plaintiff could certainly see the handwriting on the wall. The fact is, however, that the registration issue was raised by plaintiff at the outset of the arbitration; was litigated in the arbitration and argued in plaintiff's closing brief; and in the same brief plaintiff sought relief on the grounds of that issue.

8. *The contention that prior FAA opinions were not inconsistent with the FAA letter* (pp. 16-17). Plaintiff argues that prior FAA opinions were not necessarily inconsistent with the FAA's letter of November 3, 1970, since such prior opinion.

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dealt with "completely different cases and different questions" and did not relate to foreign aircraft or foreign owners "which was the main problem here." While the prior FAA opinions obviously and necessarily dealt with "different cases", they did not deal with "different questions." The question in each case was whether a lease with option to purchase should be treated as a conditional sale for purposes of registration. In each case the FAA took the position that a lease containing an option to purchase must be treated as a conditional sale and must be registered in the name of the lessee. (The only deviation from this practice was in the case of leases from financial institutions which contain an option exercisable only at the end of the lease term. There, although first adhering to its established policy of requiring all leases with options to purchase to be treated as conditional sales, the FAA subsequently relented at the urging of the parties and "permitted"—but did not require—such leases to be registered in the name of the lessor. It was brought out that the FAA thus deviated from its standard practice in the case of such leases only because of strong urging by the parties and because it was pointed out to the FAA that if the FAA did not permit this to be done, the entire transaction would collapse.) As to the question of foreign aircraft and foreign owners, this was not mentioned in the FAA letter.

9. *The contention that the FAA's letter was not contrary to then existing FAA practice* (p. 17). Plaintiff argues that the FAA's letter was not contrary to then existing practice and states that its main expert, Gaddis, testified that FAA clerks in Oklahoma City had "from time to time" routinely processed leases with options to purchase (presumably meaning they had registered the aircraft in the name of the lessee). In fact in his opinion letter given to plaintiff, Gaddis made the following flat statement (Ex. 10):

"One additional area of consideration is the possible existence of a present or *long-standing* policy of the

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Administration which is contrary to our opinion expressed above. * * * The Administration has, *as a matter of practice*, generally treated *all* leases containing options to purchase as conditional sales contracts where they are filed with the Administration without any prior or accompanying request that a formal determination be made as to their legal effect." (Emphasis supplied.)

On cross-examination, Gaddis testified that the foregoing practice of registering *all* leases with options to purchase in the name of the lessee had existed for as long as he had practiced before the FAA.

CONCLUSION

The motion for reargument should be denied.

Respectfully submitted,

SMITH, STEIBEL & ALEXANDER
Attorneys for Defendant

**Plaintiff's Reply Memorandum in Support
of its Motion for Leave to Reargue**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

**PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT
OF ITS MOTION FOR LEAVE TO REARGUE**

**I. THE COURT ERRED IN RESOLVING NUMEROUS
DISPUTED ISSUES OF FACT AGAINST THE PLAINTIFF.**

AET moved to dismiss American's complaint under Rule 12. It did not ask for summary judgment, and it filed no statement of undisputed facts, as required by Rule 9(g) of the Court's General Rules. In responding to AET's motion, American pointed out that

"AET's Motion to Dismiss is replete with factual arguments and extracts from briefs and other pleadings (many of which are taken out of context) in the arbitration and earlier state court proceedings. On the basis of the papers submitted, AET is asking this Court to resolve numerous conflicting conclusions and inferences as to what took place in the prior state court proceedings and in the arbitration. For this reason alone, and without regard to the intrinsic lack of merit of AET's arguments, the instant motion should be denied. Nor can the motion be treated as a motion for summary judgment under Rule 56, since there are a mass of disputed inferences which cannot be resolved at this stage of the case. Moreover, AET has failed to comply with this Court's General Rule 9(g) and has not set forth the undisputed facts on which a summary judgment motion must necessarily proceed."

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Hartzell Affidavit, dated March 13, 1973, paragraph 34.
See also Hartzell Supplemental Affidavit, dated March 28,
1973, paragraph 2.

American also cited several cases standing for the well-established proposition that disputed facts, and inferences to be drawn from facts, cannot be decided on a motion for summary judgment. See Memorandum, dated March 13, 1973, at 20; Supplemental Memorandum, dated March 29, 1973, at 19.

Notwithstanding the nature of AET's motion and the authorities cited by American, the Court treated the motion as an application for summary judgment and, on the basis of an incomplete record, resolved numerous factual matters against plaintiff. The Court's opinion was sharply critical of both plaintiff and its counsel, and was obviously influenced by facts which it assumed to be true.

Plaintiff's memorandum in support of its motion for reargument describes in some detail the nature of the facts in dispute, with particular reference to matters upon which the Court obviously relied. Plaintiff submits that the Court should not have accepted defendant's version of those facts without a trial.

Defendant now opposes reargument on the ground that no new facts may be brought to the Court's attention, even when those facts do no more than elaborate upon the disputed issues to explain why they cannot be resolved by way of a motion to dismiss. That plaintiff in its original papers could have engaged in "a battle of lawyers' affidavits" is true but irrelevant. If the Court wishes to treat AET's motion as a motion for summary judgment, the motion must be denied if material facts are in dispute. It is clear that such disputes exist in the case at bar.

Plaintiff does not expect the Court to accept its version of all of the facts without a trial. But neither should the Court accept defendant's version without a trial.

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II. THE COURT DID NOT DEAL WITH
THE PUBLIC POLICY ARGUMENT

AET concedes, as it must, that the Court's opinion fails to deal with plaintiff's argument that if the arbitrators decided that the aircraft could be registered their decision is manifestly in disregard of federal law and policy and cannot be given effect. In fact, AET itself asks the Court to deal with the question in deciding the motion for reargument. (AET Memorandum at 9-10.)

We agree that the matter must be decided for it lies at the heart of the plaintiff's position that defendant, regardless of the award, cannot collect damages. No matter what the arbitration award decided, if it was manifestly contrary to federal policy, it cannot stand. See *Sobel v. Hertz, Warner & Co.*, 469 F. 2d 1211 (2d Cir. 1972) (if award in "manifest disregard" of federal securities laws, it would be vacated; case remanded to district court to determine the question). And even if the award itself is confirmed, and allowed to stand as to other aspects, it will not be given effect insofar as it constitutes a holding contrary to public policy or to a superior federal law determination. See *Matter of Meyers (Kinney Motors)*, 32 App. Div. 2d 266, 301 N. Y. S. 2d 171 (1st Dep't 1969).

In the present case, the arbitrators' decision would be in manifest disregard of federal law and policy if and to the extent that they decided that the aircraft could be registered. Such a decision could not be given effect in the federal court in determining whether AET is entitled to the rental payments and damages which it seeks.

The decision on the registration issue does not turn, as defendant suggests, solely on the characterization given to the FAA letter of November 3, 1970. Regardless of how that letter is characterized, the conclusion it states is legally correct. Even if the Court were to disregard the FAA letter (which, we submit,

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it cannot), the basic issue remains the same: Can a foreign-owned aircraft be registered and used in the United States? We contend that it cannot, that this is a fundamental federal policy which has always been in effect in this country, that the citizen-owner requirement in the registration statute and FAA regulations is simply a statutory border guard to help effectuate the policy, that the Agreement here in issue was for a leasing arrangement basically in conflict with that policy, and that the rental and damage provisions therefore cannot be enforced. The full history and policy background of the federal rule can best be developed at trial, with the participation of the FAA and the CAB, whose registration and economic controls, respectively, implement and enforce the rule. But of the rule's simple and clear meaning—that foreigners cannot get their aircraft on domestic routes—there can be no doubt.*

III. DEFENDANT'S FACTUAL ARGUMENTS MERELY
DEMONSTRATE ANEW THAT MATERIAL FACTS ARE
DISPUTED IN THE CASE AT BAR.

Defendant's factual discussion simply proves anew that facts are in dispute. Indeed, it is obvious from the Court's opinion that the conclusions the Court drew from these disputed facts permeated its opinion and its ruling.

Nor can defendant's argumentative assertion of the facts and attempted answer to plaintiff's memorandum be a proper basis for the Court resolving these disputed facts without a trial.

What is perhaps most noteworthy about defendant's answering memorandum is its failure to discuss any of the matters dealt

* Furthermore, the evidence at trial will show that the officials of AET—an international airline—were well aware of the rule, and indeed that a similar rule, reflecting the same basic policy, has long been in effect in many other countries, including, we believe, Ireland.

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with at pages 19-36 of plaintiff's memorandum in support of its motion for leave to reargue.

IV. DEFENDANT'S STRATEGY IS TO AVOID ANY
DECISION ON REGISTRABILITY.

The bizarre aspect of this case is that after 3½ years of dispute and litigation, no arbitrator and no court has stated whether AET's foreign-owned aircraft could have been lawfully registered and used in the United States. This despite the fact that virtually every lawyer to examine the matter has concluded that the aircraft could not be registered and used:

(1) Harlan, Eastern's chief legal officer, believed that the aircraft were nonregistrable as soon as he heard they were foreign-owned.

(2) The Atlanta firm which is Eastern's General Counsel, after examining the matter in more detail, reached the same conclusion.

(3) Lempert, American's Assistant General Counsel, reached the same conclusion when he looked into the matter.

(4) Gaddis, a lawyer in Oklahoma City who specializes in such matters, reached the same conclusion.

(5) The FAA in Washington, after examining the matter and after conferring with the Oklahoma City office of the FAA, reached the same conclusion in the letter of November 3, 1970.

(6) AET—despite the protestations of its lawyers to the contrary—terminated the Agreement in September 1970, before registration applications could be submitted, because it too must have believed that the aircraft could not be registered.

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of its Motion for Leave to Reargue*

In short, everyone who has been informed on the subject has realized what the statute and regulations clearly provide—if the aircraft are owned by foreigners, they cannot be used in the United States.

AET's strategic advocacy has nevertheless thus far managed to avoid any direct determination of the issue.

(1) AET limited the issues in the arbitration so that the arbitrators could not and did not render a complete award, but only decided abstract questions of default and dismissal of TCA's counterclaim.

(2) AET now claims that the award affirmatively decided the registration issue, although it has previously argued to the contrary and although the award—as pointed out at pages 20-22 of plaintiff's memorandum—did not necessarily decide the issue one way or the other.

We thus have the anomalous situation where the basic problem with respect to this Agreement may never be dealt with explicitly unless this Court does so. We submit that it is wrong under any standard of law or logic for the issue to be left in such a state of limbo.

TCA and American always stood ready, and always stated that they stood ready, to proceed with the Agreement if the aircraft could be registered and used in the United States. AET, not TCA or American, terminated the Agreement in an effort to avoid having the issue decided.

Implicit in the Court's opinion seems to be its acceptance of defendant's position that American had no right to raise the registration question in 1970, or that its manner of doing so was improper. But American had a perfectly valid economic interest in having the question decided. It expected to inherit the obligation if the merger with TCA was approved. It was prepared to take the aircraft if they could be legally used although it did not

*Plaintiff's Reply Memorandum in Support
of its Motion for Leave to Reargue*

need them. But obviously if the basic arrangement would bring foreign aircraft into the United States illegally, American did not want to take them, and cannot have had an obligation to take them. The Court's opinion criticizes—we submit incorrectly—the manner in which American raised the issue. But regardless of the manner used, the question is—was American right in its conclusion that the aircraft could not lawfully be registered or used. If it was wrong, it would seem that AET could quickly have pointed that out to American and to the FAA. But it was not wrong. The law and the purpose of the law are plain. The manner in which American raised the issue is therefore irrelevant. The aircraft could not be used in the United States and it would violate the basic purpose of the law to permit AET to collect damages as if they could have been used here. This is true regardless of the arbitration award.

CONCLUSION

For the foregoing reasons it is respectfully submitted that reargument should be granted.

Dated: New York, New York
January 8, 1974

Respectfully submitted,

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Order dated January 10, 1974

This motion for leave to reargue has been considered and is granted and on reconsideration the original decision and opinion is approved and confirmed.

So Ordered

INZFA B. WYATT
U. S. D. J.

January 10, 1974

Item 13

Received copy of the within
Joint Appendix: 6-12-74

Smith, Stirling & Alexander
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